

OPENING THE SCHOOLHOUSE DOOR TO THE AIDS VIRUS:  
POLICYMAKING, POLITICS, AND PERSONALITY IN A QUEENS COUNTY  
COURTROOM, 1985-86

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Public health policy operates in a democratic paradox. The police power exists to protect individuals from harms they cannot themselves fend off, but every restriction of individual freedom in the name of public health runs against constitutionally protected individual rights. Public health officials are damned if they do, damned if they don't.

But policymakers can take steps to avoid litigation by partnering with the public in contentious public health decisions. *District 27 Community School Board v. Board of Education* and events leading to the lawsuit exemplify the democratic paradox. A largely overlooked case, *District 27* is one of the most important early AIDS cases. It was the first to consider the disease in depth. The case established the dearth of evidence that AIDS could be transmitted casually. And *District 27* signaled that AIDS did not demand and law did not permit discrimination. This article dusts off *District 27* and uses New York City's policy-making process as a case study for public health policymaking in an epidemic. It suggests ways lawyers and policymakers can balance secrecy and transparency against democratic ideals, as well as how valuing the public and allowing public input enhances policy decisions.

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## INTRODUCTION

On the first day of school in 1985, between 10 and 20 thousand pupils in the New York City borough of Queens played hooky with their parents' permission.<sup>1</sup> The students and their parents were protesting New York City's decision to allow an unidentified elementary schoolchild with Acquired Immune Deficiency Syndrome (AIDS) to attend public school. The two school districts in which most of the truants lived had already filed suit to bar any child with AIDS from any public school attended by children who did not have AIDS,<sup>2</sup> but the public's hysteric fear of the disease spilled into the streets. Angry parents and students marched, chanting, "We want good grades, not AIDS."<sup>3</sup> Children paraded with a coffin that asked, "Is This Next?"<sup>4</sup> Outside Public School 60 in Woodhaven, Queens, parents posted a warning—"Enter at your own risk."<sup>5</sup> In his

<sup>1</sup> *Pupils Out in AIDS Protest*, SAN JOSE MERCURY NEWS, Sept. 9, 1985, at A8 (estimating 10,000 students stayed home); *AIDS Boycott at 63 N.Y. Schools*, S.F. CHRON., Sept. 10, 1985, at 5 (estimating 18,000).

<sup>2</sup> Reported Opinion, *Dist. 27 Cmty. Sch. Bd. v. Bd. of Educ.*, 502 N.Y.S.2d 325, 328-29 (Sup. Ct. Queens Cnty. 1986). A note on citations to the *District 27* opinion: Under N.Y. COMP. CODES R. & REGS. tit. 22, § 7300.5 (2016), the State Reporter may approve a trial court opinion for publication with certain conditions. The "partial publication rule" allows the State Reporter to impose length criteria for reported cases. When the State Reporter invokes the partial publication rule, the judge determines which portions of the opinion are truncated. *Selection of Opinions*, N.Y. OFFICIAL REP., <https://web.archive.org/web/20140816081026/http://www.courts.state.ny.us/reporter/Selection.htm> (last visited May 12, 2016). Portions of opinions omitted from the printed reporter do not lose their legal effect in the way an unreported opinion might. The judge in *District 27* wrote an eighty-two-page opinion but truncated it for publication. When information cited is contained therein, this article will refer to the reported opinion as it does above. It will refer to materials not in the reported opinion as follows: Opinion in Full, *Dist. 27 Cmty. Sch. Bd. v. Bd. of Educ.*, No. 14940/85 (N.Y. Sup. Ct. Queens Cnty. Feb. 11, 1986).

<sup>3</sup> Joe Starita, *Fear Divides Officials, Public as AIDS Alarm Grips N.Y.*, MIAMI HERALD, Sept. 12, 1985, at A18.

<sup>4</sup> DAVID L. KIRP, *LEARNING BY HEART: AIDS AND SCHOOLCHILDREN IN AMERICA'S COMMUNITIES* 112 (1989).

<sup>5</sup> *AIDS Boycott at 63 N.Y. Schools*, *supra* note 1.

characteristically unapologetic manner, New York City Mayor Edward I. Koch shamed parents: “What are you going to do, take a child that the doctors have said is no threat to any other children and just cast that child into the river?”<sup>6</sup>

A less hysteric but more historic drama was unfolding that day inside a Queens County courtroom. Supreme Court Justice Harold Hyman was considering whether to grant the school districts’ request for a temporary restraining order to bar the unnamed child from the undisclosed school he or she would attend.<sup>7</sup> Hyman ultimately answered Koch’s question: At least for the time being, the judge would “not interfere with the child’s being in school[.]”<sup>8</sup> Hyman set the case for trial to begin in three days. Over the course of the following five weeks, lawyers, doctors, scientists, and a judge who was just “trying to learn” about AIDS would turn the Queens County Supreme Court into a public classroom.<sup>9</sup> The resultant product was an eighty-two page judicial opinion that would read like a textbook on AIDS, medical science, and policymaking.

*District 27 Community School Board v. Board of Education* “addressed the broadest range of issues”<sup>10</sup> of any case in the “brief firestorm of litigation over the rights of children with HIV infection to attend school with their peers.”<sup>11</sup> It was “the bellwether case,”<sup>12</sup> in large part because *District 27* established “the paucity of evidence implicating casual contact as a means of viral transmission.”<sup>13</sup> *District 27* also helped “defin[e] AIDS as a disease that did not demand discrimination as part of its treatment by the body politic [and] domesticated the epidemic, making it fit for norms of law and common decency.”<sup>14</sup>

Despite being one of the most important early AIDS cases, *District 27* largely has been forgotten. Justice Hyman’s eighty-two-page opinion is truncated in the official reports. Some of the most important aspects of the case are inaccessible outside archives. Among the portions of Justice Hyman’s opinion lost to the archival dustbins are the judge’s history of the AIDS epidemic, findings of fact detailing New York City’s response to pediatric AIDS, analysis of the city’s process for screening school children with AIDS before placing them in classrooms, and the judge’s scathing three-page commentary criticizing city officials for undemocratic, imperialist decision making. In retrospect, *District 27*’s omitted sections are among its most important. They contextualize policymaking and the public dread of an epidemic spreading from society’s fringes during the early AIDS crisis. Three decades after New York City decided a seven-year-old girl who had been diagnosed with AIDS posed no threat to her classmates, the time is ripe to reexamine *District 27* as a learning tool for understanding how public health and politics often collide—and how policymakers can soften the impact.

What follows is a reflection on the *District 27* drama. Part I provides the setting for

<sup>6</sup> *Id.*

<sup>7</sup> *AIDS Case Spurs Protest in New York*, ATLANTA J.-CONST., Sept. 10, 1985, at A1; *See generally* Reported Opinion, Dist. 27 Cmty.Sch. Bd., 502 N.Y.S.2d at 328.

<sup>8</sup> *Pupils Out in AIDS Protest*, *supra* note 1.

<sup>9</sup> Joseph P. Fried, *Judge ‘Trying to Learn’ in School AIDS Dispute*, N.Y. TIMES, Sept. 30, 1985, at B5.

<sup>10</sup> Frederic C. Kass, *Schoolchildren with AIDS*, in AIDS AND THE LAW 66, 72 (Dalton et al. eds. 1987).

<sup>11</sup> SCOTT SKINNER-THOMPSON, AIDS AND THE LAW 5-31-32 (5th ed. 2015).

<sup>12</sup> *Id.* at 5-32.

<sup>13</sup> Kass, *supra* note 10, at 75.

<sup>14</sup> KIRP, *supra* note 4, at 129.

*District 27*. It describes the immense fear flowing from the sudden emergence of an often fatal disease with no known cure, explores how medical science reacted, and touches on how AIDS transformed from the “gay plague” into a disease that knows no bounds. Part II takes readers into New York City government during the mid-1980s, examining how the city’s public health and school officials approached an inevitable question: What, if anything, should the city do about public school children diagnosed with AIDS? The city’s policy-making process was tainted by secrecy, but the policy itself struck an appropriate, medically sound balance between AIDS-diagnosed children’s rights and other children’s safety. Part III explores the *District 27* trial in great detail, revisiting the problems caused by secrecy in the policy-making process. The *District 27* trial illustrates differences in how the public, medical science, and policymakers conceptualize risk—particularly health risks to children. The trial vividly demonstrates secrecy and distrust can threaten even the best-intentioned health and safety policies. Part IV uses New York City’s decision-making process leading to the *District 27* trial as a case study for understanding how to use democratic persuasion to make better public policy, even during times of fear and hysteria. It suggests ways to balance secrecy and transparency against democratic ideals, as well as how policymakers can (and should) value the public and public input to enhance policy decisions. The Epilogue brings *District 27* into the twenty-first century, with looks at people’s understanding of AIDS thirty years later and whether policymakers have truly learned from the early AIDS crisis.

# I. *DISTRICT 27* IN CONTEXT: A BRIEF HISTORY OF AIDS

In retrospect, *District 27 Community School Board v. Board of Education* was a Freytagian affair.<sup>15</sup> The drama’s exposition had been ongoing for the preceding five years as AIDS slowly became national news.<sup>16</sup> The first contemporaneously documented cases of what would become known as AIDS cropped up among homosexual men in 1981. Shortly after epidemiologists identified the syndrome as something new, they documented its occurrence beyond the homosexual male population, in intravenous drug abusers, hemophiliacs, newborns whose mothers were infected, and heterosexual partners of the other risk groups.<sup>17</sup> By 1985, the AIDS crisis was in full swing, and New York City was its epicenter.<sup>18</sup> But the public did not yet understand—or did not want to understand—the disease, how it could be spread, and how to prevent it. *District 27* largely was a product of the knowledge gap between public health and the public at large, which dovetailed with people’s anxiety that the deadly disease would leach from

<sup>15</sup> See George Hartley, *Analyzing a Story’s Plot: Freytag’s Pyramid*, ENGLISH 250 FICTION UNIT (OHIO ST. UNIV.), <https://web.archive.org/web/20141208170029/http://www.ohio.edu/people/hartleyg/ref/fiction/freytag.html> (last visited May 12, 2016) (depicting Freytag’s Pyramid). Gustav Freytag was a German writer and critic, who created a widely taught visual pyramid for analyzing dramatic plots. *An Online Resource Guide to Freytag’s Pyramid*, INTUIT QUICKBASE, <https://web.archive.org/web/20140814072430/http://quickbase.intuit.com/articles/an-online-resource-guide-to-freytags-pyramid> (last visited May 12, 2016).

<sup>16</sup> *A History of AIDS Up To 1986*, AVERT, <https://web.archive.org/web/20140729184832/http://www.avert.org/history-aids-1986.htm> (last visited May 12, 2016); See generally RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC (1987) (providing an early history of the AIDS crisis in chronology).

<sup>17</sup> See *infra* notes 45-48 and accompanying text.

<sup>18</sup> See Jesus Rangel, *City Expanding Its Plan to Help Victims of AIDS*, N.Y. TIMES, Mar. 30, 1985, at A27 (noting that 35 percent of AIDS victims were in N.Y.C., whereas only 12 percent were in S.F.).

high-risk groups to the general population. Widespread fear impacted public health policy throughout the country, and New York City's decision whether to allow children diagnosed with AIDS to attend public school heightened the public alarm.<sup>19</sup> Thus, to understand *District 27*, one must first understand the early history of the AIDS epidemic in the United States.

*A. An Era of Discovery: 1981 - 1984*

The scientific community generally understands HIV-1, the principal cause of the worldwide AIDS epidemic, "evolved from a virus that crossed the species barrier from chimpanzees to humans."<sup>20</sup> The evolutionary histories of HIV-1 and the closely related simian immunodeficiency virus, which affects chimpanzees, suggest the cross-species jump occurred in Central Africa in the early 1900s.<sup>21</sup> The virus adapted to humans and began to spread. Because its victims succumbed to ordinary pathogens and disease, enabled and accelerated by the virus's decimation of the human immune system, HIV-1 spread unchecked around the world through the 1960s and 70s—at some point entering the Western Hemisphere.<sup>22</sup> AIDS was not recognized as a clinical entity, meaning it was not identified as a diagnosable medical disorder, until December 1981;<sup>23</sup> but tissue and serum samples taken in 1968 from a St. Louis teenager who later died from Kaposi's sarcoma tested positive for HIV antibodies.<sup>24</sup> The teenager apparently had never left the United States, leading researchers to conclude the virus that causes AIDS was already spreading in this country by the 1960s.<sup>25</sup>

By 1980, the "silent killer" had spread to at least five of the six inhabited continents (the virus's timeline in Asia is unclear) and infected up to 300,000 people worldwide.<sup>26</sup> Soon, a usually benign cancer would begin killing gay men in New York, and a rare strain of pneumonia would begin killing gay men in both New York and California. Silent no more, the killer would become known as America's "gay plague."<sup>27</sup>

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<sup>19</sup> See James O. Mason, *CDC's 60th Anniversary: Director's Perspective*, 55 MORBIDITY & MORTALITY WKLY. REP. 1354 (Dec. 22, 2006) [hereinafter MMWR].

<sup>20</sup> Kevin M. De Cock, Harold W. Jaffe & James W. Curran, *Reflections on 30 Years of AIDS*, 17 EMERGING INFECTIOUS DISEASES 1044, 1045 (2011).

<sup>21</sup> *Id.*

<sup>22</sup> Jonathan M. Mann, *AIDS: A Worldwide Pandemic*, in 2 CURRENT TOPICS IN AIDS 1, 1 (Michael S. Gottlieb et al. eds., 1989); De Cock, Jaffe & Curran, *supra* note 20, at 1045.

<sup>23</sup> Myron Essex, *The Etiology of AIDS: Introduction and Overview*, in AIDS: PAPERS FROM SCIENCE, 1982-1985, 3, 3 (Ruth Kulstad ed., 1986).

<sup>24</sup> Robert F. Garry et al., *Documentation of an AIDS Virus Infection in the United States in 1968*, 260 JAMA 2085, 2085-87 (1988).

<sup>25</sup> See Dennis H. Osmond, *Epidemiology of HIV/AIDS in the United States*, U.C.S.F. HIV INSITE (Mar. 2003), <https://web.archive.org/web/20140708042432/http://hivinsite.ucsf.edu/InSite?page=kb-01-03>.

<sup>26</sup> Mann, *supra* note 22, at 1.

<sup>27</sup> See Cristine Russell, *Man Cures, But Diseases Adapt*, WASH. POST, Mar. 13, 1983, at A1 (reporting that what became known as AIDS was "[f]irst called the gay plague").

### 1. The “Gay Plague”

AIDS became a clinical entity when Michael S. Gottlieb, a Los Angeles immunology professor, and his colleagues recognized pneumocystis pneumonia (PCP), which until that time was documented in the United States almost exclusively among the severely immunosuppressed, was occurring at elevated rates among homosexual men.<sup>28</sup> Gottlieb’s team submitted an article to the *New England Journal of Medicine* describing the PCP infections as occurring among “previously healthy, homosexual men” in the Los Angeles area, which the researchers ascribed to a “potentially transmissible immune deficiency.”<sup>29</sup> While awaiting publication, Gottlieb reported his observations to the U.S. Centers for Disease Control (CDC), resulting in a then-overlooked note in *Morbidity and Mortality Weekly Report* titled “*Pneumocystis Pneumonia – Los Angeles*,” which is now recognized as the start of the AIDS crisis in the United States.<sup>30</sup>

Around the same time as Gottlieb and his team were observing strange PCP infections among homosexual men, the spring of 1981, a New York doctor was documenting an unusual outbreak of Kaposi’s sarcoma among gay men in New York City and San Francisco.<sup>31</sup> The sudden outbreak of Kaposi’s sarcoma was alarming, not only because cases should be seen rarely, if ever, but also because it appeared to be targeting gay men.<sup>32</sup> The usually benign cancer was also behaving abnormally: Its targets were decades younger than they should have been. The telltale lesions had appeared all over patients’ bodies, rather than on their legs. And the men were dying way too fast.<sup>33</sup> A collection of doctors investigated the eight cases in which the Kaposi’s sarcoma patients had died and found all the men positive for hepatitis B and a slew of other sexually transmitted diseases. The researchers hypothesized the cancer’s “unusual occurrence” was related to the men’s “expos[ure] to sexually transmitted diseases.”<sup>34</sup>

The Kaposi’s sarcoma investigation was national news, but it was not yet front-page news.<sup>35</sup> That changed in July when the CDC linked Gottlieb’s report from the June 5, 1981, issue of *Morbidity and Mortality Weekly Report (MMWR)* with the Kaposi’s sarcoma occurrences. Because the first five PCP patients, whose cases comprised the June 5 report, were unrelated to one another and had no common contacts or sexual partners,<sup>36</sup> the PCP outbreak first appeared to be a mere coincidence. Within a month, however, *MMWR* reported ten new cases of PCP among gay men in Los Angeles, “suggest[ing] the 5 previously reported cases were not an isolated

<sup>28</sup> See Essex, *supra* note 23, at 3.

<sup>29</sup> Michael S. Gottlieb et al., *Pneumocystis carinii Pneumonia and Mucosal Candidiasis in Previously Healthy Homosexual Men: Evidence of a New Acquired Cellular Immunodeficiency*, 305 NEW ENG. J. MED. 1425, 1425 (1981).

<sup>30</sup> See generally CDC, *Pneumocystis Pneumonia – Los Angeles*, 30 MMWR 1 (June 5, 1981).

<sup>31</sup> See generally Alvin E. Friedman-Kien, *Disseminated Kaposi’s Sarcoma Syndrome in Young Homosexual Men*, 5 J. AM. ACAD. OF DERMATOLOGY 468 (Oct. 1981).

<sup>32</sup> See Lawrence K. Altman, *Rare Cancer Seen in 41 Homosexuals*, N.Y. TIMES, July 3, 1981, at A20.

<sup>33</sup> See generally Kenneth B. Hymes et al., *Kaposi’s Sarcoma in Homosexual Men – A Report of Eight Cases*, 318 LANCET 598 (1981).

<sup>34</sup> *Id.* at 598.

<sup>35</sup> See Altman, *supra* note 32.

<sup>36</sup> CDC, *supra* note 30, at 1-3.

phenomenon.”<sup>37</sup> The breakouts of two opportunistic infections—PCP and Kaposi’s sarcoma—among previously healthy homosexual men who did not fit the traditional profiles of those diseases raised eyebrows at the CDC. In its July 3, 1981, *MMWR*, the CDC linked the outbreaks and warned physicians to “be alert for Kaposi’s Sarcoma, PC pneumonia, and other opportunistic infections associated with immunosuppression in homosexual men.”<sup>38</sup> But the spate of opportunistic infections did not appear to be a danger to anyone except gay men.<sup>39</sup> By 1982, doctors and the public were aware of this nameless new disease—referred to by some as the “gay plague” and initially among researchers as Gay-Related Immune Deficiency—sweeping through the gay community, demolishing men’s immune systems, and enabling otherwise survivable pathogens to consume their victims.<sup>40</sup>

The disease’s etiology was widely hypothesized. Perhaps the syndrome was related to homosexuals’ use of the chemical inhalants amyl nitrate or isobutyl nitrate, commonly known as “poppers.” Both were widely used by gay men, including those diagnosed with PCP and Kaposi’s sarcoma, to enhance sexual experiences; and the nitrates were known immunosuppressants.<sup>41</sup> Or the disease could be due to the effects of repeated exposure to sperm, a theory later described as a “sophisticated theory” built upon the notion that “repeated exposure to another’s sperm could trigger an immune response, resulting in a condition resembling chronic graft-versus-host disease and, ultimately, opportunistic infections” like PCP and Kaposi’s sarcoma.<sup>42</sup> Still others hypothesized AIDS was due to “a sort of physiological battle fatigue in which the immune system simply wore out.”<sup>43</sup> Many of these theories retrospectively read much like the plainer public explanation: AIDS was simply punishment for homosexuals’ and intravenous drug users’ terrible lifestyles.<sup>44</sup>

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<sup>37</sup> CDC, *Kaposi’s Sarcoma and Pneumocystis Pneumonia Among Homosexual Men—New York City and California*, 30 *MMWR* 305, 306 (July 3, 1981).

<sup>38</sup> *Id.* at 307.

<sup>39</sup> See Altman, *supra* note 32.

<sup>40</sup> See generally SHILTS, *supra* note 16 (using the term GRID); Kent A. Sepkowitz, *AIDS—The First 20 Years*, 344 *NEW ENG. J. MED.* 1764, 1765 (2001) (replacement of GRID with AIDS); Geoffrey Cowley, *The Day They Discovered the AIDS Virus*, MSNBC (Apr. 23, 2014, 12:07 p.m.), <https://web.archive.org/web/20140813100257/http://www.msnbc.com/msnbc/the-day-they-discovered-the-aids-virus> (the public’s association of AIDS with homosexuals long after it was documented among other groups).

<sup>41</sup> See Sepkowitz, *supra* note 40, at 1764 (discussing early etiology theories); see, e.g., James J. Goedert, *Amyl Nitrate May Alter T-Lymphocytes in Homosexual Men*, 319 *LANCET* 412 (1982) (suggesting nitrates may be a causal factor for immunosuppression related to Kaposi’s Sarcoma in homosexual men).

<sup>42</sup> Sepkowitz, *supra* note 40, at 1764 (characterizing Giora M. Mavligit et al., *Chronic Immune Stimulation by Sperm Alloantigens: Support for the Hypothesis that Spermatozoa Induce Immune Dysregulation in Homosexual Males*, 251 *JAMA* 237 (1984)). See SHILTS, *supra* note 16, at 118-33 (discussing researchers’ initial focus on “poppers and the sperm theory”).

<sup>43</sup> Sepkowitz, *supra* note 40, at 1764 (characterizing Joseph Sonnabend, et al., *Acquired Immunodeficiency Syndrome, Opportunistic Infections, and Malignancies in Male Homosexuals: A Hypothesis of Etiologic Factors in Pathogenesis*, 249 *JAMA* 2370 (1983) and Jay A. Levy & John L. Ziegler, *Acquired Immunodeficiency Syndrome is an Opportunistic Infection and Kaposi’s Sarcoma Results from Secondary Immune Stimulation*, 322 *LANCET* 78 (1983)).

<sup>44</sup> See, e.g., William F. Buckley, Jr., Op-Ed., *Crucial Steps in Combating the AIDS Epidemic: Identify All the Carriers*, *N.Y. TIMES*, Mar. 18, 1986, at A27 (suggesting homosexuals with AIDS be tattooed with a “scarlet letter” to protect others). See generally SHILTS, *supra* note 16 (exploring the public’s perception of the AIDS epidemic).

## 2. AIDS Becomes a Clinical Entity and Diagnoses Expand Beyond Homosexuals

In popular thought the disease remained the “gay plague”, even after public health abandoned the “Gay-Related Immune Deficiency” terminology. Almost as soon as the disease became a clinical entity, AIDS was documented among intravenous drug users<sup>45</sup> and hemophiliacs.<sup>46</sup> AIDS was also reported in risk-group members’ sex partners and newborn children of infected mothers.<sup>47</sup> The first cases of heterosexual AIDS transmission were reported from New York in the January 7, 1983, *MMWR*.<sup>48</sup> And the disease was also cropping up worldwide. As Lawrence Altman wrote in *The New York Times* that year, “In many parts of the world there is anxiety, bafflement, a sense that something has to be done—although no one knows what—about this fatal disease.”<sup>49</sup> No one knew what to do because no one knew what caused the disease in the first place.<sup>50</sup> Then, in 1983 and 1984, a group of French scientists and a group of U.S. scientists each isolated a new retrovirus as the causal mechanism for AIDS.<sup>51</sup> The U.S. scientists called the virus *Human T-Lymphotropic Virus Type III* (HTLV-III). The French called it *Lymphadenopathy Associated Virus* (LAV). In 1986, after political jockeying over whether to use the U.S. or French moniker, HTLV-III/LAV was renamed *Human Immunodeficiency Virus* (HIV).<sup>52</sup>

In the years preceding discovery of the virus that causes AIDS, the field of retrovirology had been developing rapidly and allowed scientists to quickly develop a test for HIV antibodies.<sup>53</sup> The antibody test then led to three important discoveries: (1) the latency period from HIV infection to the AIDS stage is many years; (2) at the time the virus was discovered, the number of people infected with HIV was much greater than the number of people showing symptoms; and

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<sup>45</sup> See Henry Masur, et al., *An Outbreak of Community-Acquired Pneumocystis carinii Pneumonia: Initial Manifestation of Cellular Immune Dysfunction*, 305 NEW ENG. J. MED. 1431 (1981) (finding PCP and immunosuppression among homosexuals and drug abusers).

<sup>46</sup> CDC, *Pneumocystis carinii Pneumonia Among Persons with Hemophilia A*, 31 *MMWR* 365-67 (July 16, 1982).

<sup>47</sup> See Essex, *supra* note 23, at 3.

<sup>48</sup> CDC, *Immunodeficiency Among Female Sexual Partners of Males with Acquired Immune Deficiency Syndrome (AIDS) – New York*, 31 *MMWR* 697 (Jan. 7, 1983).

<sup>49</sup> Lawrence K. Altman, *Concern Over AIDS Grows Internationally*, N.Y. TIMES, May 24, 1983, at C1.

<sup>50</sup> *Id.*

<sup>51</sup> See Françoise Barré-Sinoussi, et al., *Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome*, 220 SCI. 868 (1983); Mikulas Popovic, et al., *Detection, Isolation, and Continuous Production of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and Pre-AIDS*, 224 SCI. 497 (1984); Robert C. Gallo, et al., *Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 SCI. 500 (1984); Jörg Schüpbach, et al., *Serological Analysis of a Subgroup of Human T-Lymphotropic Retroviruses (HTLV-III) Associated with AIDS*, 224 SCI. 503 (1984); M.G. Sarngadharan, et al., *Antibodies Reactive with Human T-Lymphotropic Retroviruses (HTLV-III) in the Serum of Patients with AIDS*, 224 SCI. 506 (1984). See also Lawrence K. Altman, *New U.S. Report Names Virus That May Cause AIDS*, N.Y. TIMES, Apr. 24, 1984, at C1 (discussing the announcement of the American group’s findings).

<sup>52</sup> See *A History of AIDS Up To 1986*, *supra* note 16.

<sup>53</sup> See Mann, *supra* note 22, at 2.



(3) studies among geographically different populations illustrated the virus's global reach.<sup>54</sup> Nevertheless, public education was lacking. Rapid scientific development during the early years of the AIDS epidemic, the disease's progression among heterosexuals, discovery of the viral cause, and subsequent democratization of HIV infection did not ease the public's fear or convince them AIDS was not still the "gay plague"—a punishment for hedonists.<sup>55</sup> Conflicting media reports, political jousting, and the knowledge gap between medical science and laypeople contributed to mass fear and panic that AIDS would spread uncontrollably during the mid-1980s.

### 3. Precautionary Measures to Prevent AIDS Transmission: Some CDC Recommendations before District 27

Although the virus that causes AIDS was not discovered until 1983 and 1984, science and medicine had moved rapidly to respond to the new disease from the beginning. By the time New York City decided it would not automatically bar schoolchildren with AIDS from public classrooms, epidemiologists had already tied AIDS transmission to the transmission patterns of the well-understood hepatitis B virus.<sup>56</sup> The medical community was aware of how to protect against AIDS exposure in high-risk environments, such as hospitals, as early as November 1982, when the CDC published the first clinical precautions for treating AIDS patients. The CDC's recommended precautions included common-sense measures such as handling blood samples with gloves, avoiding needle sticks, disposing of needles in puncture-resistant containers, and thoroughly washing hands after blood exposure.<sup>57</sup> In March 1983, the CDC, Public Health Service, Food and Drug Administration, and National Institutes of Health jointly released consensus recommendations on preventing AIDS in the clinical setting. The announcement noted that while the cause of AIDS was unknown, its dispersion paralleled hepatitis B, which medicine knew to be transmitted by sex and blood. The prevention recommendations, therefore, centered on sexual contact, blood donation, and intravenous drug use—which remain essentially correct and largely unrevised today.<sup>58</sup> By 1984, AIDS transmission was indisputably linked to blood, body fluids, sexual activity, intravenous drug abuse, and blood transfusions.<sup>59</sup> And by 1985, the risk of casual transmission was considered by researchers to be infinitesimal. It had become clear that in the United States AIDS was almost exclusively transmitted through sexual contact, intravenous

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., *Movie Stars Will Tell Everything – But Not That Finally the Spotlight is on Hollywood's Taboo of Taboos – Will Public Care?*, ORLANDO SENTINEL, July 28, 1985, at A12 (calling AIDS "the gay plague" and arguing that Rock Hudson's diagnosis with AIDS outed him as a homosexual).

<sup>56</sup> See Jean L. Marx, *New Disease Baffles Medical Community*, 217 SCI. 618, 618-21 (1982) ("The spread of AIDS resembles that of hepatitis B virus."); James R. Allen, *Epidemiology in the United States*, in AIDS: A BASIC GUIDE FOR CLINICIANS 15, 22-23 (eds. Peter Ebbesen et al., 1984) (discussing transmission patterns of AIDS before the viral etiology was proven).

<sup>57</sup> CDC, *Current Trends Acquired Immune Deficiency Syndrome (AIDS): Precautions for Clinical and Laboratory Staffs*, 31 MMWR 577, 577-80 (Nov. 5, 1982).

<sup>58</sup> CDC, *Current Trends Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations*, 32 MMWR 101, 101-03 (Mar. 4, 1983). See Mason, *supra* note 19, at 1356.

<sup>59</sup> See Marx, *supra* note 56, at 618-20 (discussing possible transmission via blood, blood products, sexual contact, and contaminated needles); Allen, *supra* note 56, at 23 (discussing suspected modes of transmission); Jean L. Marx, *Spread of AIDS Sparks New Health Concern*, 219 SCI. 42, 42-43 (1983) (discussing AIDS transmission).

drug use with contaminated needles, blood or blood-product transfusions, or from an infected mother to her newborn child.<sup>60</sup>

### B. *A Year of Uncertainty and Fear: 1985*

Once medical science knew the disease's cause, had a blood test to identify sufferers, and was confident of prevention measures, the question changed. "What is AIDS?" became "What do we do about it?" By 1985, more than a third of all AIDS cases in the United States were within New York City's five boroughs.<sup>61</sup> AIDS was the leading cause of death among New York men aged between thirty and forty.<sup>62</sup> New Yorkers were "terrified of catching AIDS—and frequently misinformed about how it spreads," according to a *New York Daily News* poll taken that September. Although almost everyone polled knew the virus that causes AIDS was transmissible through sex and blood, more than half the city's population wrongly thought AIDS was transmissible by kissing. Only half the city knew they could not get the disease through sneezes.<sup>63</sup>

AIDS had become a public health crisis, and fear of the deadly disease gripped even medical workers. Some New York City hospitals had treated AIDS patients so badly that doctors were afraid to send their patients for treatment anywhere but a few friendly hospitals. St. Luke's-Roosevelt Hospital's private rooms were half full of dying AIDS victims, and other hospitals with a good record of AIDS treatment similarly were overwhelmed. Hospitals became so crowded with AIDS patients in early 1985 that doctors had difficulty directly admitting AIDS patients, leading some doctors to thwart procedure and advise patients to go directly to the emergency room, where, by law, they could not be denied treatment.<sup>64</sup> The fear of AIDS had also become the fear of gay men. Anti-gay discrimination was rampant, with reports of AIDS patients being summarily fired and at least one uninfected gay man being sacked for catching a cold.<sup>65</sup>

Ed Koch, New York City's sharp-tongued, brash mayor was running for reelection, and he was being attacked on all sides for his response to the crisis. Victims' rights advocates and gay leaders pounded the mayor for what seemed an inappropriately feeble response to the health crisis.<sup>66</sup> Activist Larry Kramer's "boiling hot . . . fiercely polemical drama"<sup>67</sup> about AIDS and the

<sup>60</sup> See James W. Curran, et al., *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCI. 1352, 1355 (1985) (overviewing epidemiology and AIDS transmission from the disease's discovery through 1985).

<sup>61</sup> See Rangel, *supra* note 18.

<sup>62</sup> *Facing AIDS' Reality: Cope With 33,000 Cases*, Editorial, N.Y. DAILY NEWS, Aug. 18, 1985, at 37.

<sup>63</sup> *What New Yorkers Think*, Poll, N.Y. DAILY NEWS, Sept. 19, 1985, at 3.

<sup>64</sup> SHILTS, *supra* note 16, at 507.

<sup>65</sup> *Facing AIDS' Reality*, *supra* note 62.

<sup>66</sup> See, e.g., Carol Greitzer (N.Y.C. Council Member), Letter to the Editor, *Ill Fated*, N.Y. MAG., Apr. 8, 1985, at 9 (describing the city's slow response to a council member inquiry and alleged failures in AIDS response); Mary Elizabeth Williams, *Ed Koch's Enduring, Uneasy Gay Legacy*, SALON (Feb. 1, 2013), [https://web.archive.org/web/20140109180126/http://www.salon.com/2013/02/01/ed\\_kochs\\_enduring\\_uneasy\\_gay\\_legacy/](https://web.archive.org/web/20140109180126/http://www.salon.com/2013/02/01/ed_kochs_enduring_uneasy_gay_legacy/) (discussing Koch's legacy on AIDS and allegations of homosexuality); David France, *Ed Koch and the AIDS Crisis: His Greatest Failure*, N.Y. MAG. (Feb. 1, 2013), <https://web.archive.org/web/20140730095944/http://nymag.com/daily/intelligencer/2013/02/koch-and-the-aids-crisis-his-greatest-failure.html> (the same).

<sup>67</sup> Frank Rich, Review, *'The Normal Heart' by Larry Kramer*, N.Y. TIMES, Apr. 22, 1985, at C17.

public's reaction to the crisis, *The Normal Heart*, premiered at the Public Theater in April. Kramer minced no words when confronting the establishment—including public health officials, more cautious AIDS activists, and particularly Koch, whom Kramer attacked as failing to confront the AIDS crisis because the mayor was secretly gay himself.<sup>68</sup> Koch, in his characteristic brusque manner, shot back that alleging the “administration has not done enough for AIDS victims, because . . . if we did more I would be linked with homosexuality” was “outrageous,” “irrelevant,” but “[r]egrettably . . . [a] technique used in order to seek to slander an individual.”<sup>69</sup> Nevertheless, Kramer “succeeded where the reasoned pleas of researchers and experts had failed, bringing the issue at last to the forefront of civic issues.”<sup>70</sup> *The Normal Heart* put the heat on Koch, who, just hours before the play's first preview show but after the script had circulated among media, hurriedly pledged millions of dollars to expand the city's AIDS services.<sup>71</sup>

If *The Normal Heart* helped make AIDS a civic issue in New York City, Rock Hudson made it a personal issue for many Americans in the heartland. The country had grown up watching his films. An A-list star known for his “physical attributes, rather than his acting abilities,” Hudson was a considerable hunk who had “spent an inordinate amount of screen time with his shirt off.”<sup>72</sup> On July 15, 1985, Hudson appeared haggard and gaunt at a public appearance with actress Doris Day, sparking rumors the actor was ill.<sup>73</sup> A week later, he collapsed in a Paris hotel lobby and was hospitalized. On July 23, United Press International issued a bulletin that Hudson had “inoperable liver cancer possibly linked to AIDS,” setting off a media frenzy.<sup>74</sup> Although Hudson's spokesman denied the actor had the disease, the mere “possibility that Rock Hudson had AIDS . . . electrified the nation.”<sup>75</sup> On July 25, ten days after his appearance with Doris Day, Rock Hudson's spokesperson confirmed the actor was suffering from AIDS.<sup>76</sup> That Sunday, “AIDS was on the front page of virtually every . . . morning paper in the United States.”<sup>77</sup> Hudson's announcement had instantaneously “startled the public” and propelled AIDS into heterosexual America's living rooms.<sup>78</sup>

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<sup>68</sup> See Sharon Churcher, *Public Theater's AIDS Play Has City Hall in a Flap*, N.Y. MAG., Mar. 18, 1985, at 11 (reviewing *The Normal Heart* and Kramer on Koch).

<sup>69</sup> Rangel, *supra* note 18.

<sup>70</sup> SHILTS, *supra* note 16, at 556.

<sup>71</sup> See Churcher, *supra* note 68, at 11 (discussing the play and its upcoming preview on March 29); Rangel, *supra* note 18 (announcing the city's expansion of AIDS services). See also SHILTS, *supra* note 16, at 556 (discussing the link between the play and the city's announcement).

<sup>72</sup> *Rock Hudson*, N.Y. TIMES, <https://web.archive.org/web/20140106055558/http://www.nytimes.com/movies/person/33748/Rock-Hudson/biography> (last visited May 12, 2016).

<sup>73</sup> See, e.g., *NBC Evening News* (NBC television broadcast July 23, 1985) (reporting on Hudson's illness and showing clips of the actor at the July 15 press conference) (available through the Vanderbilt Television News Archive).

<sup>74</sup> *Rock Hudson, Reportedly Fatally Ill, Being Treated at AIDS Center in Paris*, SEATTLE TIMES, July 23, 1985, at A1 (the UPI bulletin).

<sup>75</sup> SHILTS, *supra* note 16, at 576.

<sup>76</sup> See *Hudson's Case Drawing National Attention to AIDS*, ATLANTA J.-CONST., July 26, 1985, at A1.

<sup>77</sup> SHILTS, *supra* note 16, at 578.

<sup>78</sup> *Hudson's Case Drawing National Attention to AIDS*, *supra* note 76.

Nevertheless, the syndrome had still not shaken its image as the gay plague in the country's popular imagination. A nationwide column from July 28 that year is telling: "When it was announced that actor Rock Hudson is suffering from AIDS, the gay plague, decades of rumors about his sexuality came to an end. As only it can, the litmus test of acquired immune deficiency syndrome identified Hudson as a gay man."<sup>79</sup> Then came Ryan White, a teenage hemophiliac with star quality, who had contracted AIDS from a blood transfusion. White was thrust into the national spotlight in August 1985, when he was barred from his Indiana public school. On August 27, just three days before New York City's announcement that it would not automatically bar children with AIDS from public schools, White appeared on ABC's *Good Morning America* and became the face of AIDS for a generation.<sup>80</sup>

Ryan White's story helped America begin to see AIDS as something different from hedonists' just deserts. But the pendulum swung too far too fast. Rock Hudson's announcement cracked the façade that AIDS was a problem just of homosexuals and drug abusers by raising suspicion and apprehension among heterosexual women who had long admired the silver-screen star.<sup>81</sup> Ryan White showed the disease did not discriminate against innocents. Increased media coverage of babies infected in utero or during vaginal delivery meant heterosexual women were vulnerable. But public awareness of AIDS, particularly heterosexual transmission, "bypassed the real significance," which was that the disease was concentrated among certain risk groups and linked with particular risky behaviors.<sup>82</sup> The sudden media and public interest in AIDS during the spring and summer of 1985 was often sensationalist, verging on panicky. A public health official later described news coverage as "unwilling or unable to distinguish and articulate the shades of uncertainty that formed the reality of AIDS."<sup>83</sup> He went on to say, only somewhat jokingly, that he had "rather expected to see the front page of the *New York Post* proclaiming 'Martians Land with AIDS.'"<sup>84</sup> Later, during the *District 27* trial, the *Post* did print a number of sensationalist banner headlines, although none attributed AIDS to aliens.<sup>85</sup>

## II. SECRECY'S DOUBLE-EDGED SWORD: HOW GOOD POLICY GOT A BAD RAP

The pervasiveness of AIDS in stigmatized groups through the mid-1980s had allowed the public largely to "distance themselves psychologically from the epidemic and those directly affected by it."<sup>86</sup> *The Normal Heart*, Rock Hudson's announcement, and Ryan White's activism

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<sup>79</sup> *Movie Stars Will Tell Everything*, *supra* note 55.

<sup>80</sup> See KIRP, *supra* note 4, at 26-62 (discussing Ryan White's situation and legal battle); Dirk Johnson, *Ryan White Dies of AIDS at 18: His Struggle Helped Pierce Myths*, N.Y. TIMES, Apr. 9, 1990, at D10 (White's obituary).

<sup>81</sup> Randy Shilts, *Rock's Role: Actor Turned Spotlight on AIDS Crisis*, N.Y. DAILY NEWS, Oct. 5, 1985, at 19.

<sup>82</sup> See STEPHEN C. JOSEPH, *DRAGON WITHIN THE GATES: THE ONCE AND FUTURE AIDS EPIDEMIC* 139-40 (1990).

<sup>83</sup> *Id.* at 78.

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Chris Olert & Paul Tharp, *Kid Hookers in Times Sq. May Be Spreading AIDS*, N.Y. POST, Oct. 9, 1985, at 14; *The AIDS Timebomb*, N.Y. POST, Sept. 9, 1985, at 1.

<sup>86</sup> JOSEPH, *supra* note 82, at 93.

helped shrink that distance. Fear set in.<sup>87</sup> During the same time period—in the first half of 1985—New York City officials were considering whether children with AIDS would be allowed to attend public school and how the city’s public school system would treat HIV-positive children if allowed into the classroom. Although public health and school officials throughout the country were aware of the impending question, parents were not. Indeed, “[t]he very idea that a child with AIDS might attend school came a surprise to New Yorkers” when the city announced its policy that children with AIDS would not be automatically kept away from public school classrooms.<sup>88</sup> Although the city’s answer was entirely appropriate—as Justice Harold Hyman put it in his *District 27* ruling, “[T]he automatic exclusion of children with AIDS from the regular classroom would effect a purpose having no adequate connection with the public health, safety or welfare”—most parents never even knew there was an outstanding question about AIDS in schools.<sup>89</sup>

#### A. *Developing New York City’s Policy Behind Closed Doors*

New York City’s non-exclusion policy was not without careful consideration. The city’s public health officials had anticipated the question of how to educate children diagnosed with AIDS in as early as 1983. That year, science teachers asked the New York City Department of Health for guidance, in light of AIDS, on precautions for school laboratories.<sup>90</sup> The Department of Health recommended schools take the same steps regarding AIDS as they would for hepatitis B—wash hands that come into contact with blood and clean blood spills with bleach, for example—even though hepatitis B was known to be more easily transmitted than the then-unidentified causative agent for AIDS.<sup>91</sup>

In November 1984, the Department of Health’s pediatric AIDS expert, Dr. Pauline (Polly) A. Thomas, attended the first national pediatric meeting on AIDS.<sup>92</sup> Pediatricians at the conference agreed children with AIDS could attend school, although some doctors suggested hepatitis-B-like precautions.<sup>93</sup> Upon her return from the conference, Thomas suggested to

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<sup>87</sup> See *id.* at 139 (discussing deep anxiety after Rock Hudson’s death); Allan M. Brandt, *AIDS: Public History to Public Policy*, in *AIDS AND THE PUBLIC DEBATE: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 124, 125-26 (Caroline Hannaway ed., 1996) (discussing fear in the 1980s); *Should Actors Take AIDS Test Before Filming a Kiss?*, JET, Sept. 9, 1985, at 60 (describing “sensational rumors” in Hollywood about which actors may be gay and “whether actresses might be jeopardizing their health by filming intimate kissing scenes”).

<sup>88</sup> KIRP, *supra* note 4, at 102.

<sup>89</sup> Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 335 (emphasis in original).

<sup>90</sup> Opinion in Full at 12, Dist. 27 Cmty. Sch. Bd. v. Bd. of Educ., No. 14940/85 (N.Y. Sup. Ct. Queens Cnty. Feb. 11, 1986).

<sup>91</sup> *Id.* As early as 1982, AIDS distribution and transmission was reported to resemble hepatitis B. In 1983, the CDC recommended AIDS caregivers follow the same precautions as recommended for hepatitis B. See, e.g., CDC, *Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations*, 32 MMWR 101, 101-03 (Mar. 4, 1983). See also CDC, *Acquired Immune Deficiency Syndrome (AIDS): Precautions for Clinical and Laboratory Staffs*, 31 MMWR 577, 577-80 (Nov. 5, 1982) (describing clinical precautions related to AIDS).

<sup>92</sup> Opinion in Full at 13, Dist. 27 Cmty. Sch. Bd.; Frederick A.O. Schwarz, Jr. & Schaffer, *Law, Social Policy, and Contagious Disease*, 14 HOFSTRA L. REV. 163, 164 n.5 (1985).

<sup>93</sup> Opinion in Full at 13, Dist. 27 Cmty. Sch. Bd.

superiors that the Department of Health decide whether and what precautions New York City schools should take.<sup>94</sup> During the 1984-85 school year, officials had already recommended three children with AIDS receive home instruction.<sup>95</sup> In December 1984, Thomas “alerted her superior that ‘precedents set now may be difficult to break.’”<sup>96</sup>

The Department of Health continued to consider the appropriate policy on schoolchildren diagnosed with AIDS throughout the spring of 1985.<sup>97</sup> On April 12, a New York City Board of Education deputy chancellor wrote Commissioner of Health David Sencer, requesting he issue written guidelines on the admission and attendance of public school children with AIDS.<sup>98</sup> From April 15 to 17, Sencer and Thomas attended an international AIDS conference co-sponsored by the U.S. Public Health Service and the World Health Organization, where researchers unveiled a large number of newly completed studies on AIDS transmission, including controlled studies of infections in the family setting.<sup>99</sup> The results uniformly found “no evidence for casual transmission of the virus within households.”<sup>100</sup> A few weeks after the international conference, Sencer wrote back to the Board of Education that there would be no policy change regarding the children already on home instruction for the rest of the 1984-85 school year.<sup>101</sup> Sencer went on to say the Department of Health and Board of Education should create citywide guidelines for the 1985-86 school year.<sup>102</sup> He requested the Board of Education appoint a representative, which it did on May 23.<sup>103</sup>

### 1. Inside City Government: Spring and Summer, 1985

The Department of Health and Board of Education initiated joint meetings in June. Also in June, the CDC invited a group of consultants to Atlanta to “assist in the preparation of recommendations on the issues that would be raised” by people opposed to allowing children with HIV or AIDS into the classroom.<sup>104</sup> Dr. Polly Thomas again represented the Department of Health.<sup>105</sup> At the CDC meeting, medical experts unanimously agreed that such children could

<sup>94</sup> *Id.* at 13-14.

<sup>95</sup> Joyce Purnick, *Quinones Warns About Fears*, N.Y. TIMES, Aug. 30, 1985, at B2. *See* Opinion in Full at 14, Dist. 27 Cmty. Sch. Bd.

<sup>96</sup> Opinion in Full at 14, Dist. 27 Cmty. Sch. Bd.

<sup>97</sup> *See id.*; KIRP, *supra* note 4, at 104-05.

<sup>98</sup> Opinion in Full at 14, Dist. 27 Cmty. Sch. Bd.

<sup>99</sup> Memorandum from David Sencer, Comm’r of Health, N.Y.C., to Edward Koch, Mayor, N.Y.C. (Apr. 12, 1985).

<sup>100</sup> *Id.* *See* Alex Goddard, *The History of AIDS: A Timeline*, N.Y. HIST. SOC’Y, <https://web.archive.org/web/20140710140456/http://aids.nyhistory.org/timeline/> (noting the dates of the international conference) (last visited May 12, 2016).

<sup>101</sup> Opinion in Full at 15, Dist. 27 Cmty. Sch. Bd.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> RONALD BAYER, *PRIVATE ACTS, SOCIAL CONSEQUENCES: AIDS AND THE POLITICS OF PUBLIC HEALTH* 139 (1989).

<sup>105</sup> *Id.*; Opinion in Full at 15, Dist. 27 Cmty. Sch. Bd.

attend school.<sup>106</sup> On July 1, *The New York Times* reported New York City would promulgate guidelines that “could admit AIDS children to public school next fall.”<sup>107</sup> Commissioner Sencer told the *Times*, “If they’re well enough to go to school, they’re not a risk to other children.”<sup>108</sup> The process, Sencer said, would “take a lot of patient discussion, not only with the Board of Education, but with the community at large.”<sup>109</sup> Shortly thereafter in early July, the Department of Health drafted guidelines “establishing a policy of fully integrating children with AIDS or related conditions into the public schools.”<sup>110</sup>

The Department of Health’s policy guidelines never substantively changed over the summer. They drew upon the best available medical science, largely from the studies Thomas had accessed at the two pediatric AIDS conferences, and included subsidiary policies for how schools would manage children with immunosuppression.<sup>111</sup> The subsidiary policies exempted immunosuppressed students from certain vaccinations, set forth measures for schools responding to outbreaks of some airborne viral infections, such as chicken pox, and recommended precautionary measures for managing bleeding injuries and cleaning surfaces soiled by blood.<sup>112</sup> Despite months spent gathering the best available research on AIDS transmission and developing detailed policy guidelines, the Department of Health and Board of Education never attempted to have that “patient discussion . . . with the community at large” Sencer had mentioned. Throughout the summer, New York City officials never even announced the policy-making process was underway. Mayor Koch was uncharacteristically silent.

Perhaps not knowing the extent of the Department of Health’s policy development, Koch tapped three of New York City’s highest officials to develop the city’s final policy. Corporation Counsel Frederick A. O. (Fritz) Schwarz, Jr., head of the Law Department, Department of Health Commissioner David Sencer, and Board of Education Chancellor Nathan Quinones would have the final say.<sup>113</sup> They agreed there was no reasonable medical basis for excluding children infected with the virus that causes AIDS from public schools. The Department of Health policy guidelines would remain intact. Yet “[n]ot one word” about the policy “was passed along to the community school boards” at any point in the process.<sup>114</sup> Likewise, the public was left in the dark after the July 1 *New York Times* mention.

Commissioner Sencer later claimed he was awaiting the CDC’s recommendations,<sup>115</sup> but he had known their contents for months.<sup>116</sup> Chancellor Quinones would later say he did not know

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<sup>106</sup> Opinion in Full at 15, Dist. 27 Cmty. Sch. Bd.

<sup>107</sup> Jane Gross, *AIDS Children Struggle with Tragic Legacy*, N.Y. TIMES, July 1, 1985, at A1.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Opinion in Full at 15, Dist. 27 Cmty. Sch. Bd.

<sup>111</sup> *Id.* at 15-16.

<sup>112</sup> *Id.*

<sup>113</sup> Telephone Interview with Frederick A. O. Schwarz, Jr., Former N.Y.C. Corporation Counsel, (Feb. 18, 2015).

<sup>114</sup> KIRP, *supra* note 4, at 105.

<sup>115</sup> Opinion in Full at 16, Dist. 27 Cmty. Sch. Bd.

<sup>116</sup> KIRP, *supra* note 4, at 108.

what the policy would be since the determination was Sencer's.<sup>117</sup> After local schools began to rebel against the city's silence, Mayor Koch issued a press release saying Quinones was asking for Sencer's recommendation.<sup>118</sup> Behind the façade of public announcements, all three knew the policy would be one of not automatically excluding children diagnosed with AIDS from public school classroom. After all, Sencer and Quinones had, at Koch's behest, worked together on the policy.<sup>119</sup>

## 2. City Officials Speak: August, 1985, Two Weeks before the Fall Semester

New York City officials remained silent until August 27, when the mayor's office issued a press release saying Chancellor Quinones had asked Commissioner Sencer for guidance on AIDS among school children and Sencer was consulting with experts "for advice on how the public school system should deal with children who have AIDS."<sup>120</sup> No mention of the community-wide discussion Sencer had earlier said would be necessary. No mention that a deputy chancellor had requested written guidelines in 1984. No mention of the Schwarz-Sencer-Quinones task force. No mention that the policy guidelines had been floating around the Department of Health for months.<sup>121</sup>

At a press conference at City Hall on August 29, Quinones told *The New York Times* Sencer was still drawing up the policy on schoolchildren with AIDS.<sup>122</sup> Quinones said he did not know the scope of the policy or whether it would conflict with the votes in the two Queens school districts.<sup>123</sup> Within the hour, the CDC released a recommendation that children infected with the virus that causes AIDS generally be able to attend public school classes.<sup>124</sup> After the CDC recommendations, Quinones again told reporters he was waiting to find out Sencer's recommendation.<sup>125</sup>

Finally, on August 30, Mayor Koch and city officials including Sencer and Quinones announced the policy drawn up by the Department of Health months earlier: New York City would not automatically segregate children diagnosed with AIDS from public school classrooms.<sup>126</sup> Rather, the children would be screened on a case-by-case basis by a Department of

<sup>117</sup> See Purnick, *supra* note 95 (describing Quinones as assuming Sencer was drawing up guidelines).

<sup>118</sup> See *Schools Asking Advice on Pupils with AIDS*, N.Y. TIMES, Aug. 28, 1985, at B2.

<sup>119</sup> Telephone Interview with Frederick A. O. Schwarz, Jr., Former N.Y.C. Corporation Counsel (Feb. 18, 2015); Frederick A. O. Schwarz, Jr., Oral History, Edward I. Koch Administration Oral History Project, Columbia Univ., 1994, at 3:239 [hereinafter Schwarz Oral History].

<sup>120</sup> *Schools Asking Advice on Pupils with AIDS*, *supra* note 117, at B2.

<sup>121</sup> Telephone Interview with Frederick A. O. Schwarz, Jr., Former N.Y.C. Corporation Counsel (Feb. 18, 2015).

<sup>122</sup> Purnick, *supra* note 95.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Joseph P. Fried, *Queens School Unit Rejects City's Policy on AIDS Screening*, N.Y. TIMES, Sept. 1, 1985, at 41.



Health panel.<sup>127</sup> City officials, particularly Sencer, caught flack in the form of a public relations disaster, five-week-long trial, and judicial opinion lambasting city officials' misguided paternalism.

### B. Queens Parents React

While New York City officials worked behind closed doors to create an adequate citywide policy on educating children with AIDS, the mood in Queens as the 1985 school year approached was "plague panic."<sup>128</sup> In July, Queens residents had rallied against the Department of Health's attempt to house ten AIDS patients at a nursing home in the Neponsit neighborhood on the Rockaway Peninsula.<sup>129</sup> Rockaway residents were in "near hysteria" over the plan.<sup>130</sup> "They will be ambulatory . . . They will be walking in our streets," one community leader reportedly shouted to a raucous crowd of around a thousand assembled against the city.<sup>131</sup> The local community school board president, Samuel Granirer, spoke at the rally: The ten AIDS victims, if sheltered at the Neponsit nursing home, would be a threat to schoolchildren. "Let me tell you," Granirer pronounced, "they are going to be educated in safety."<sup>132</sup>

Local residents and the nursing home sued to prevent the city from carrying out its plan. After Queens County Supreme Court Justice Harold Hyman—the judge who would preside over the *District 27* trial—issued a temporary restraining order against the city, Mayor Ed Koch backed down from the Neponsit plan. But Garnirer's campaign against the city was not over. A month after rallying against the Neponsit plan, the District 27 Community School Board President would lead parents' crusade against integrating children with AIDS to public school classrooms.<sup>133</sup>

The community school boards in districts 27 and 29, both in Queens, had in mid-August called upon Chancellor Quinones to issue policy guidelines on AIDS.<sup>134</sup> A response did not come quickly enough. On August 22, the District 27 Community School Board voted to classify AIDS as a communicable disease, which the local board said required "appropriate isolation."<sup>135</sup> District 27, the city's largest community school district, would keep children diagnosed with AIDS from attending public school there.<sup>136</sup> Those children, if there were any, would receive home instruction. The community board's reasoning was that the "cause and transmission" of AIDS was unknown,<sup>137</sup> even though the retroviral cause had already been established (a test, albeit

<sup>127</sup> *Id.*

<sup>128</sup> *The Real Fear of AIDS Musn't be Plague Panic*, Editorial, N.Y. DAILY NEWS, Sept. 1, 1985, at 43.

<sup>129</sup> Joseph P. Fried, *Roots of AIDS Boycott: Record of Independence*, N.Y. TIMES, Sept. 16, 1985, at B1.

<sup>130</sup> See Ellis Henican & T.J. Collins, *AIDS Haven Fought*, NEWSDAY, Aug. 15, 1985, at 7.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Ellis Henican, *Boycott Chief's AIDS Crusade*, NEWSDAY, Sept. 11, 1985, at 19.

<sup>134</sup> Jennifer Brier, "Save Our Kids, Keep AIDS Out:" *Anti-AIDS Activism and the Legacy of Community Control in Queens*, *New York*, 39 J. OF SOC. HIST. 965, 970 (2006).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

somewhat unreliable, was even available) and the modes of transmission were well known to medical experts by that time.<sup>138</sup> The District 29 Community School Board soon followed suit.<sup>139</sup>

At a press conference on August 29, city officials announced they were developing a policy on schoolchildren with AIDS, which would apply in all five boroughs. Half an hour later, the CDC released its recommendation that children with AIDS not be automatically shut out of schools. Within a few hours District 27 had revolted. Superintendent Marvin Aaron told reporters that evening, "I cannot allow that child to enter the school."<sup>140</sup> New York City Chancellor of Education Nathan Quinones responded that the community school district was powerless to set its own policy. Aaron claimed the community school district's ban on children with AIDS reflected "concern on the part of children, staff, teachers, everyone . . . . We just don't know enough about the disease." Quinones retorted, "Fear is not going to be the factor by which we will separate children," and the city imminently would issue its own guidelines for public schools citywide.<sup>141</sup> That announcement came from Koch, Quinones, Sencer, and Board of Education President James Regan at an August 30 City Hall press conference. The city's policy would be to not automatically exclude children with AIDS from the classroom; rather, each child would be screened by a panel of experts.<sup>142</sup>

Even though the city's August 30 announcement meant only that a child with AIDS *may* attend public school, two school districts in Queens, District 27 and District 29, began planning for rebellion as soon as the city announced its non-exclusion policy.<sup>143</sup>

Mayor Koch only added to disarray and confusion by coming out in opposition to admitting children with AIDS into schools. At a September 1 mayoral primary campaign event, Koch made a bold but misinformed prediction: "I don't believe you're going to have any kids with AIDS ending up in the classroom."<sup>144</sup> The mayor qualified his prediction by explaining he would want to have children with AIDS attend public school if "you can establish that a child would be better off, and the child's colleagues would be equally safe." But Koch said he did not "believe you can establish that."<sup>145</sup> While conceding there was no scientific evidence of casual AIDS transmission, Koch tapped into Queens parents' frustrations and told the crowd he would "rather err on the side of caution" and keep children with AIDS out of the classroom.<sup>146</sup>

District 27 Community School Board President Samuel Granirer further fueled parents' passions. He thrust District 27 into the national spotlight at a September 4 press conference,

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<sup>138</sup> James W. Curran, *The CDC and the Investigation of the Epidemiology of AIDS*, in AIDS AND THE PUBLIC DEBATE: HISTORICAL AND CONTEMPORARY PERSPECTIVES 19, 25 (Caroline Hannaway ed., 1995).

<sup>139</sup> Brier, *supra* note 133, at 970.

<sup>140</sup> James Peters, Suzanne Golubski & Stuart Marques, *Ban on AIDS Pupils*, N.Y. DAILY NEWS, Aug. 30, 1985, at 5.

<sup>141</sup> *Id.*

<sup>142</sup> Suzanne Golubski & Mike Santangelo, *New Rules for AIDS Pupils: Ed Says They'll Need Special OK for School*, N.Y. DAILY NEWS, Aug. 31, 1985, at 3; Joyce Purnick, *Panel to Decide AIDS School Cases*, N.Y. TIMES, Aug. 31, 1985, at 26.

<sup>143</sup> KIRP, *supra* note 4, at 106.

<sup>144</sup> Joyce Purnick, *Pupils With AIDS a Risk, Koch Says*, N.Y. TIMES, Sept. 2, 1985, at 25.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

where Granirer was joined by Daniel Carter, president of Ryan White's school board in Kokomo, Indiana.<sup>147</sup> As children and parents picketed against the CDC's recommendation and New York City's policy, Carter called out public officials for being "cavalier . . . contradictory or inconsistent" and putting children at risk.<sup>148</sup> Carter said public health officials' attitudes were the same "folly of overconfidence" that preceded the Titanic's voyage.<sup>149</sup> The two school leaders called for a national moratorium to restrain children with AIDS from attending public schools.<sup>150</sup> At the time, Ryan White was being forced to receive his seventh-grade instruction by telephone from his home.

On September 5, five hundred parents convened a meeting at P.S. 63 in Ozone Park, Queens, to coordinate their efforts.<sup>151</sup> One member of the District 27 Community School Board channeled Alabama's segregationist Governor George Wallace and called on parents to "join us in standing in the schoolhouse door."<sup>152</sup> Two days later, and only two days before the start of the 1985-86 school year, came the inciting incident for the *District 27* drama: Chancellor Quinones and Commissioner Sencer announced one anonymous seven-year-old child who had been previously been diagnosed with AIDS, but who had been in school for the past three years, *would* attend public school; and the child's identity and school would remain confidential.<sup>153</sup> Although they did not literally stand in the schoolhouse door, parents did post a warning at P.S. 60 in Woodhaven—"Enter at your own risk."<sup>154</sup>

Between 10 and 20 thousand children stayed home from school that first day. Parents and pupils in Queens were on strike. Only 156 of more than 1,000 enrolled students showed up for the first day of class at P.S. 63.<sup>155</sup> One protesting child was dressed as an AIDS victim and wheeled into the school in a plywood coffin.<sup>156</sup> Hundreds marched through Queens chanting "Save our kids! Keep AIDS out!"<sup>157</sup> Granirer, the community school board president, rallied a crowd of parents, exclaiming, "[T]he city fathers [are] ready to throw us into jail and we're not going . . . The way to tell the city to get lost is to go to court."<sup>158</sup> District 27 (along with District 29) filed suit and asked for a temporary restraining order prohibiting any AIDS-infected child from attending public school.

<sup>147</sup> Kristen Kelch, *Some Educators Seek School Ban on AIDS Victims*, NEWSDAY, Sept. 4, 1985, at 23.

<sup>148</sup> Jack Peritz, *Rebel School Board Bigs Blast Move to Enroll AIDS Kids*, N.Y. POST, Sept. 3, 1985, at 13.

<sup>149</sup> *Id.*

<sup>150</sup> Kelch, *supra* note 146.

<sup>151</sup> Dudley Clendinen, *'Epidemic of Fear' in U.S.*, N.Y. TIMES, Sept. 8, 1985, 27.

<sup>152</sup> *Id.*

<sup>153</sup> Robert D. McFadden, *Schools in New York Will Admit an AIDS Pupil But Not 3 Others*, N.Y. TIMES, Sept. 8, 1985, at 1.

<sup>154</sup> *AIDS Boycott at 63 N.Y. Schools*, *supra* note 1.

<sup>155</sup> Cynthia Fagen, Davind Ng & Leo Standora, *11,000 Pupils Out in Protest*, N.Y. POST, Sept. 10, 1985, at 1.

<sup>156</sup> *Id.*

<sup>157</sup> James Peters & Thomas Hanrahan, *Queens Parents Vow to Continue Boycott*, N.Y. DAILY NEWS, Sept. 10, 1985, at 3.

<sup>158</sup> *Id.*

### III. THE *DISTRICT 27* TRIAL: A LEGISLATIVE HEARING IN A QUEENS COURTROOM

The drama that played out in the *District 27* litigation lasted months, as lawyers and the judge effectively conducted a legislative hearing in the Queens County Supreme Court. In the fall of 1985, two lawyers who wanted to educate the public, a judge who wanted to learn, and a parade of AIDS experts spent five weeks in the courtroom, detailing exactly what medical science did and did not know about AIDS and its causal virus. The ensuing judicial opinion would read like a textbook on the disease and how to develop public health policy in an epidemic.

#### A. Schwarz Admonishes Judge: A Rocky Start<sup>159</sup>

The *District 27* case began with a dramatic hearing on the temporary restraining order. New York Supreme Court Justice Harold Hyman initially refused to allow David Ellenhorn, an attorney hired to represent the child, to participate as intervenor in the case. Ellenhorn stormed out of the courtroom.<sup>160</sup>

The local schools' attorney that day was Harry Lipsig, an eighty-three-year-old trial lawyer who had, in his fifty-year litigation career, become known as New York's "King of Torts."<sup>161</sup> Lipsig's protégé, Robert Sullivan, would lead the schools' representation. On that first morning, however, Lipsig set the stage: AIDS research is "inconclusive," the syndrome is a modern Black Plague, and to allow a child with AIDS in a public classroom is "a rash act."<sup>162</sup>

New York City's Corporation Counsel, Fritz Schwarz, made a "rare courtroom appearance" to argue the city's position.<sup>163</sup> Although Schwarz was a seasoned litigator on leave from Cravath, Swaine & Moore, one of New York City's most prestigious white-shoe firms, the Corporation Counsel is head of the New York City Law Department and primarily serves an advisory and administrative counsel role. His presence in the courtroom added to the gravity of the hearing and emphasized how important the case was to the Koch administration.<sup>164</sup> When Schwarz began to respond to Lipsig's opening, Justice Hyman started yelling and wagging his finger.<sup>165</sup> Risking a contempt citation, Schwarz rebuked the judge. "Judge, don't yell at me, and don't point your finger at me," Schwarz later recalled saying. Hyman, then irate, got louder, continued yelling, and resumed his finger wagging: "Who are you?" Schwarz identified himself and said, "Judge, I'm telling you, stop yelling at me. Stop pointing your finger at me. Or we're not going to make any progress here."<sup>166</sup> Hyman and Schwarz both cooled off. Hyman denied the

<sup>159</sup> This phrasing is borrowed from the *New York Post*'s caption to a photograph of Schwarz squaring off with Hyman in the courtroom. See N.Y. POST, Sept. 10, 1985, at 5.

<sup>160</sup> Jack Peritz & David Ng, *AIDS Expert: Keep 'Em Out*, N.Y. POST, Sept. 13, 1985.

<sup>161</sup> Robert McG. Thomas, Jr., *Harry Lipsig, Who Talked Juries Out of Millions, Is Dead at 93*, N.Y. TIMES, Aug. 13, 1995, at 39.

<sup>162</sup> KIRP, *supra* note 4, at 112.

<sup>163</sup> Jack Peritz & Charles Lachman, *Judge Orders a Hearing Over Sick 2d Grader*, N.Y. POST, Sept. 10, 1985, at 5.

<sup>164</sup> *Id.*

<sup>165</sup> KIRP, *supra* note 4, at 113.

<sup>166</sup> Schwarz Oral History, *supra* note 119, at 3:241.

schools' request for a temporary restraining order, telling the parties he would "not interfere with the child's being in school."<sup>167</sup> He set the trial to begin in three days.<sup>168</sup>

Justice Hyman's decision on the temporary restraining order was not a foregone conclusion. Media-and-politics-driven AIDS hysteria had gripped Queens. Parents were protesting and picketing his courtroom. The elected judge was determining whether to allow a child infected with the deadly disease to attend school with those parents' children. And Justice Hyman was facing pressure from his own family: His niece was a public school teacher, whom the judge disclosed had threatened to quit her job and leave the city if he allowed a child with AIDS to attend public school.<sup>169</sup> Nevertheless, Justice Hyman was known as "fair-minded" and "not biased against the city," so the city's lawyers did not seek his removal.<sup>170</sup> In his own words, Justice Hyman's philosophy was, "You don't have to respect me. Respect the robe."<sup>171</sup>

Perhaps most importantly, Justice Hyman did not suffer from hubris. He admitted he knew virtually nothing about AIDS but was willing to learn.<sup>172</sup> That willingness to learn allowed the parties to go beyond the papers alone and conduct a trial to develop a full record on AIDS. Together, Justice Hyman and attorneys on both sides of the case used the *District 27* trial as a public education device to cut through media hype and political spin on AIDS and help close the gap between medical science and the public's knowledge of the disease.

#### *B. Going Beyond the Narrow Scope of Review for New York Mandamus Actions*

New York law limits the questions that may be raised in mandamus actions,<sup>173</sup> which are legal actions seeking to either compel an agency to perform a legal duty or challenge an agency's jurisdictionally sound, non-adjudicatory administrative determination.<sup>174</sup> In mandamus actions, the only permissible legal challenges are whether the decision maker "failed to perform a duty enjoined upon it by law"<sup>175</sup> or whether the decision violated "lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."<sup>176</sup> Thus, the primary questions before Justice Hyman were narrow: Did New York law create any substantive or procedural duty requiring the Commissioner of Health or Chancellor of Education to exclude any child with AIDS, AIDS-Related Complex, or the AIDS virus from public schools?<sup>177</sup> Was the

<sup>167</sup> *Pupils Out in AIDS Protest*, *supra* note 1.

<sup>168</sup> Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 328.

<sup>169</sup> See Schwarz Oral History, *supra* note 119, at 3:242.

<sup>170</sup> KIRP, *supra* note 4, at 106; Telephone Interview with Frederick A. O. Schwarz, Jr., Former N.Y.C. Corporation Counsel (Dec. 4, 2014).

<sup>171</sup> KIRP, *supra* note 4, at 115.

<sup>172</sup> *Id.*

<sup>173</sup> Technically the system of writs, which includes mandamus, is abolished in New York. Nevertheless, judicial review of agency actions under N.Y. C.P.L.R. 7803 (McKinney 2014), referred to as an Article 78 proceeding, generally tracks the old writ system.

<sup>174</sup> Vincent C. Alexander, Practice Commentary, N.Y. C.P.L.R. 7801:3 (McKinney 2014).

<sup>175</sup> N.Y. C.P.L.R. 7803:1 (McKinney 2014).

<sup>176</sup> N.Y. C.P.L.R. 7803:3 (McKinney 2014).

<sup>177</sup> See Opinion in Full at 10, Dist. 27 Cmty. Sch. Bd.

decision to not automatically bar children diagnosed with AIDS from public schools arbitrary and capricious?<sup>178</sup> Justice Hyman ultimately concluded the answer to both questions was handily “no.”<sup>179</sup>

As to whether the Commissioner of Health or Chancellor of Education was duty-bound to exclude schoolchildren with AIDS from public schools—historically termed a “mandamus to compel”—the school boards were required to show their “clear legal right” to relief, meaning there was no “reasonable doubt or controversy” as to the duty.<sup>180</sup> The school boards argued “communicable disease” provisions in the New York City Health Code<sup>181</sup> and New York state laws on public health and sanitation<sup>182</sup> imposed a legal duty on New York City to isolate or exclude children with AIDS from public schools.<sup>183</sup> At the time, however, AIDS had not been classified as a communicable disease in New York. The court concluded that while AIDS was confidentially reportable under a special state regulation, New York had “declined to . . . include AIDS on the list of communicable diseases,”<sup>184</sup> resulting in AIDS not being a disease that would invoke City Health Code provisions on public school isolation or exclusion. The court held neither the Commissioner of Health nor Chancellor of Education had a legal duty to bar children with AIDS from public schools.<sup>185</sup>

Having determined neither the Commissioner nor Chancellor was legally bound to exclude children with AIDS from public schools, the court examined the rationale behind New York City’s discretionary decision to not do so. Whether the city had the legal power to exclude (or not exclude) children was not at issue in *District 27*. The premise of the school boards’ challenge was that city officials had the power to exclude children with AIDS from public schools, if they so chose. The city conceded its broad discretionary power under the New York City Charter and Health Code would have allowed the exclusion of children with AIDS from the classroom if the Commissioner of Health were to conclude that AIDS was communicable in

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<sup>178</sup> *Id.*

<sup>179</sup> See Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 334 (concluding the school boards “failed to demonstrate” a legal duty to exclude children with AIDS and noting that the “State Public Health Council and State Education Department [had already] addressed this very issue”); *id.* at 335 (concluding the decision not to exclude AIDS children was not arbitrary and capricious because it was based on “five years of experience” with AIDS and continuing to note that the court “empathizes with the fears and concerns of parents . . . [but cannot] be influenced by unsubstantiated fears of catastrophe”).

<sup>180</sup> *Ass’n of Surrogate & Supreme Court Reporters v. Bartlett*, 357 N.E. 2d 353, 355 (N.Y. 1976).

<sup>181</sup> See Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 333 (citing N.Y.C. Health Code §§ 11.67 (prohibiting intentional or negligent spread of disease by persons who are “cases or carriers of communicable disease”), 45.17(b) (requiring schools isolate cases and carriers of communicable disease and providing facilities for isolation), and 49.15(d) (mandating exclusion of any child who is a case, contact, or carrier of a communicable disease be excluded from elementary and junior high schools)).

<sup>182</sup> *Id.* See N.Y. PUB. HEALTH LAW §§ 225(5)(h) (McKinney 1985) (empowering the Public Health Council to “designate the communicable diseases which are dangerous to the public health”); N.Y. COMP. CODES R. & REGS. tit. 10, § 2.1(a) (1985) (listing diseases deemed communicable but not including HIV/AIDS).

<sup>183</sup> See Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 333 (discussing the laws on which school boards relied).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 325.

schools or children with AIDS would promote the disease's spread. The school boards challenged the city's refusal to exercise its discretion to automatically exclude children with AIDS.<sup>186</sup>

Once the Commissioner of Health made a discretionary decision to not automatically exclude children with AIDS from public schools, the only remaining question was whether the decision was arbitrary and capricious—put another way, was there any rational basis for the Commissioner's decision.<sup>187</sup> Generally, administrative challenges to an agency's discretionary decision, like the one in *District 27*, get resolved on the papers alone. The judge simply reviews documents filed in court to decide whether the agency's action was appropriate. Under New York law, the court's review of a discretionary administrative decision within an agency's jurisdiction is "limited to the grounds invoked by the agency,"<sup>188</sup> so the reviewing court usually has no need for evidence or hearings beyond the papers parties file in court. Nevertheless, the reviewing court is empowered to take evidence or conduct hearings to ascertain the facts upon which the agency made its decision,<sup>189</sup> which sometimes is necessary because administrative determinations are, by definition, without a formal record generated by adjudication. That is what happened in *District 27*.

### C. *Rising Action and Climax: Attorneys as Teachers, a Judge as Schoolmaster*

*District 27* ultimately went to trial because Justice Hyman believed "intense public interest and media attention" coupled with "highly emotional and controversial questions of civil rights, confidentiality, government, and school-aged children touched by one of the most publicized lethal infectious killers known to modern medicine," in his words, "*dictated* that this court invoke the rarely utilized power to require a trial of the facts."<sup>190</sup> At one point during the trial, Justice Hyman motioned to reporters, television announcers, and sketch artists filling the jury box and proclaimed, "This is not a jury trial, but they are the jury."<sup>191</sup> The Queens courtroom was to be a public classroom.

Reflecting on the case thirty years later, Fritz Schwarz, who argued for the city, recalled a meeting with the school boards' attorney, Robert Sullivan:

I did not want the case resolved on the papers. I wanted a full record to help educate the public. Before the trial, Bob Sullivan came to visit me at the Corporation Counsel's office, probably to feel out his opponent. I told him I would try to fairly put forward facts on the science [about AIDS]. Sullivan, of course, wanted to win. But he either already wanted to take the case in that

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<sup>186</sup> *Id.* at 334 (discussing parties' legal posture on the health commissioner's discretionary power).

<sup>187</sup> *See Pell v. Bd. of Educ.*, 313 N.E. 2d 321, 325 (N.Y. 1974).

<sup>188</sup> *Parkmed Assoc. v. N.Y. State Tax Comm'n*, 459 N.E. 2d 153, 154 (N.Y. 1983).

<sup>189</sup> *See, e.g., Pasta Chef, Inc. v. State Liquor Auth.*, 389 N.Y.S. 2d 72 (4th Dep't 1976), *aff'd* 377 N.E. 2d 480 (N.Y. 1978).

<sup>190</sup> Reported Opinion, *Dist. 27 Cmty. Sch. Bd.*, 502 N.Y.S.2d at 329 (emphasis added).

<sup>191</sup> Stewart Ain, *AIDS Trial Presence: The Press*, N.Y. DAILY NEWS, Sept. 25, 1985.

direction or thought ‘we are in this together,’ because he did not push hard for a narrow record.<sup>192</sup>

By Sullivan’s account, the decision to have a full trial had already been made by the judge. “It was all Justice Hyman’s idea,” Sullivan remembered. Of course, both sides were eager to present their cases to the public. But it was “Hyman [who initially] said we were going to try this case in a public forum. He was upset with the city’s timeline for announcing the HIV-positive child would be in the regular classroom. Hyman said we were going to air the entire thing with experts, because press coverage would be huge. It was really going to be an effort to educate the public.”<sup>193</sup>

In a sense, the *District 27* case became a noble cause for all involved to educate the public. According to Justice Hyman, “[F]rom the outset, the parties and the court recognized an opportunity to conduct a broad-ranging, aggregative inquiry calculated to advance the public education about AIDS.”<sup>194</sup> To meaningfully achieve “this well-intentioned purpose,” as Justice Hyman described it, “the trial at times necessitated exploring matters not strictly relevant to this one child . . . [such as] the rationality behind those decisions [concerning school children with AIDS] as established by the medical and scientific evidence presented in court.”<sup>195</sup>

Schwarz also saw trial as an opportunity to educate Justice Hyman on the disease beyond what a papers-only review could achieve. As the trial progressed, Justice Hyman’s prejudices became evident, particularly when the judge would grill witnesses.<sup>196</sup> “[I]t was tough to educate him,” Schwarz later recalled. “The [judge’s] biases were so strong at the beginning.”<sup>197</sup> For example, early on, the judge posed the following hypothetical to one of the city’s medical experts:

Suppose you’ve got a homosexual, he is reported to you, he’s on his last leg. Don’t you have a right for the safety of the general public to keep that man off the street, even though he may not be contagious merely by speaking to him or looking at him. But he is shown, as a homosexual to go out into that same field to commit the same homosexual act? He can infect 150 more people within 150 days . . . . Now you’ve got his name, you’ve got his address, and yet the Department does nothing about picking this person up and seeing to it that he’s either quarantined or something.<sup>198</sup>

One doctor testified he had treated hundreds of patients infected with AIDS, all but one of whom exhibited clear risk factors. The doctor told the court he suspected the one patient was a homosexual, although the patient denied it. Justice Hyman asked the doctor whether he

<sup>192</sup> Telephone Interview with Frederick A. O. Schwarz, Jr., Former N.Y.C. Corporation Counsel (Dec. 4, 2014).

<sup>193</sup> Telephone Interview with Robert Sullivan (Mar. 23, 2015).

<sup>194</sup> Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 329.

<sup>195</sup> *Id.*

<sup>196</sup> See KIRP, *supra* note 4, at 116.

<sup>197</sup> Schwarz Oral History, *supra* note 119, at 3:243.

<sup>198</sup> KIRP, *supra* note 4, at 116; Dorothy Nelkin & Stephen Hilgartner, *Disputed Dimensions of Risk: A Public School Controversy over AIDS*, 64 MILBANK Q. 118, 139 (1986).



administered a “test” on the patient “to decide if he was a homosexual.”<sup>199</sup> When the doctor explained to the judge there was no such test for homosexuality, Justice Hyman responded with disbelief.<sup>200</sup> During recess, the judge told lawyers he “didn’t believe a word” the witness had said. “I know you can tell. I’ve been to Fire Island.”<sup>201</sup> But to his credit, Justice Hyman acknowledged during trial, “This is going to be a tough decision to make, so I’m trying to learn, and that’s why I’m asking these questions.”<sup>202</sup> Justice Hyman, the parents who packed the gallery, and reporters from across the nation were to learn about AIDS from a who’s who of AIDS experts, including AIDS research pioneers like Arye Rubinstein.<sup>203</sup> The five-week-long trial would exhaustively explore social, medical, and political dimensions of AIDS. In doing so, the trial would also illustrate the complexity of public health policymaking during an epidemic.

### 1. The Social Dimension of AIDS: Gauging Risk and Evaluating Evidence

When it comes to risk, particularly risk to children, it is human nature to seek absolute assurances. Parents in Queens wanted to know their children would be “completely, totally safe,” as one of the parents who picketed the *District 27* hearings put it.<sup>204</sup> Unfortunately, science and medicine do not spring forth from the head of a god, fully armed and ready for battle, like the Roman goddess Minerva.<sup>205</sup> There rarely, if ever, are definite answers in public health because science and medicine are indeterminate.<sup>206</sup> Public health defines risk “in terms of effects on populations, while the lay audience is concerned with individuals.”<sup>207</sup> Evidence may be substantial but not “perfectly clear.”<sup>208</sup> It may involve inherent unpredictability due to variations in natural systems.<sup>209</sup> Human bodies are different. Viruses mutate. But policymakers must nevertheless make decisions.

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<sup>199</sup> Schwarz Oral History, *supra* note 119, at 3:243.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* Fire Island is a New York resort island and gay haven known for its indulgent summer parties.

<sup>202</sup> KIRP, *supra* note 4, at 116.

<sup>203</sup> Rubinstein was among the first doctors to document AIDS among children. When he submitted a study of five children he diagnosed with AIDS to the American Academy of Pediatrics in December 1982, the study was rejected on the belief that AIDS was confined to homosexuals. *AIDS in New York: A Biography*, N.Y. MAG. (June 5, 2006), <https://web.archive.org/web/20130405102031/http://nymag.com/news/features/17158/>; SHILTS, *supra* note 16, at 103-04, 171-72, 188-89, 399-400 (discussing Rubinstein’s research and the establishment’s general refusal to accept that AIDS was affecting infants).

<sup>204</sup> Bill Minutaglio, *Schools: The New AIDS Battleground*, DALL. MORNING NEWS, Sept. 22, 1985, at 1F.

<sup>205</sup> See H. DAVID BRUMBLE, CLASSICAL MYTHS AND LEGENDS IN THE MIDDLE AGES AND RENAISSANCE: A DICTIONARY OF ALLEGORICAL MEANINGS 218-22 (1998) (overviewing the goddess Minerva).

<sup>206</sup> Sheila S. Jasanoff, *Contested Boundaries in Policy-Relevant Science*, 17 SOC. STUD. OF SCI. 195, 224 (1987).

<sup>207</sup> PETER BENNETT, COMMUNICATING ABOUT RISKS TO PUBLIC HEALTH: POINTERS TO GOOD PRACTICE 14 (1997).

<sup>208</sup> KANT PATEL & MARK E. RUSHEFSKY, THE POLITICS OF PUBLIC HEALTH IN THE UNITED STATES 150 (2004).

<sup>209</sup> See Richard C.J. Somerville & Susan Joy Hassol, *Communicating the Science of Climate Change*, PHYSICS TODAY, Oct. 2011, at 51; Tim Palmer, *Uncertainty in Science*, in SCIENCE SEES FURTHER 6 (2010).

The public and experts not only gauge risk differently, but also rely on different variables to evaluate evidence. Public health tends to develop policy based on science, statistics, objective expertise, and logic. The public often evaluates new risks based on intuitive reasoning, inferences based on experience, and what they already know.<sup>210</sup> Science and medicine speak about risk as probability. For medical experts, some risk is acceptable, and probabilities change with knowledge or population characteristics.<sup>211</sup> They tend to see a death as a death.<sup>212</sup> The public wants to know true or false, yes or no, safe or not.<sup>213</sup> Odds are not availing. How a person dies matters.<sup>214</sup>

The risk of transmitting AIDS through bodily fluids other than blood is an example of the rift between lay and expert definitions of acceptable risk. Bodily fluids were central to parents' fears and the community school districts' case.<sup>215</sup> Jeanie Alferi kept her son out of school because she had raised him to "share[] his doughnuts, his cookies, and his juice."<sup>216</sup> Alferi feared her son "could get sick and die" if his good manners were to bring him into contact with saliva from a child with AIDS. Corrine Lebowitz, whose child was about to enter kindergarten, also worried about saliva and sharing: "Kids share a lot of things, and I just don't want a kid with AIDS asking my kid if she wants to suck on a lollipop."<sup>217</sup> Parents' fears were not irrational. Many news outlets created confusion by refusing to print or say "semen" or "vaginal secretions," instead reporting AIDS transmission as occurring by blood or euphemistic "bodily fluids."<sup>218</sup> The euphemism became particularly problematic for public understanding of AIDS when researchers isolated HIV in saliva in 1984.<sup>219</sup> *The New York Times* reported the study as raising "real public health concerns."<sup>220</sup> Then, on the same day it released guidelines for integrating children infected with the AIDS virus into schools, the CDC announced a new study had isolated HIV in tears.<sup>221</sup>

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<sup>210</sup> WILLIAM LEISS & DOUGLAS POWELL, *MAD COWS AND MOTHER'S MILK: THE PERILS OF POOR RISK COMMUNICATION* 26-27 (2nd ed., 2004); David P. Ropeik, *Risk Communication: An Overlooked Tool for Improving Public Health*, in *PUBLIC HEALTH AND PREVENTIVE MEDICINE* 1030 (Robert B. Wallace et al. eds., 15th ed., 2008).

<sup>211</sup> ANDREA KITTA, *VACCINATIONS AND PUBLIC CONCERN IN HISTORY: LEGEND, RUMOR, AND RISK PERCEPTION* 110 (2011).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> See Opinion in Full, at 31-32, Dist. 27 Cmty. Sch. Bd. (discussing bodily fluids and AIDS transmission); Nelkin & Hilgartner, *supra* note 197, at 122.

<sup>216</sup> Jeffrey Page, *Parents Voice Fear of AIDS in School*, THE RECORD (Hackensack, N.J.), Sept. 11, 1985, at A1.

<sup>217</sup> *Id.*

<sup>218</sup> JAMES COLGROVE, *EPIDEMIC CITY: THE POLITICS OF PUBLIC HEALTH IN NEW YORK* 139 (2011).

<sup>219</sup> See Jerome E. Groopman et al., *HTLV-III in Saliva of People with AIDS-Related Complex*, 226 SCI. 447 (1984).

<sup>220</sup> Lawrence K. Altman, *AIDS Studies Hint Saliva May Transmit Infection*, N.Y. TIMES, Oct. 9, 1984, at C1.

<sup>221</sup> See CDC, *Recommendations for Preventing Possible Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus from Tears*, 34 MMWR 533 (Aug. 30, 1985) (describing the results of research on the virus in tears); Leslie S. Fujikawa et al., *Isolation of Human T-Lymphotropic Virus Type III from the Tears*

Inside the *District 27* courtroom, “saliva, tears, sweat, vomit, [and] stools . . . were a major preoccupation.”<sup>222</sup> Robert Sullivan, the lawyer for the school districts, brought parents’ fears to the fore. He pressed witnesses to state unequivocally that AIDS could not be transmitted by children in school. He concentrated on the public’s intuitive assessment of risk: Will schools be safe or not? Yes or no? What if . . . ?<sup>223</sup> Sullivan asked experts if the disease could be spread through the practice of becoming blood-brothers/sisters.<sup>224</sup> What about chewing on the same pencil? If children share food?<sup>225</sup> Or get in a fight?<sup>226</sup> What happens if there is urine on a toilet seat from a child with AIDS and another child sits in it? Everyone shares water fountains. Are they completely safe?<sup>227</sup> He drew out uncertainties in the medical studies on AIDS transmission and sought to establish that city officials had unscrupulously minimized or neglected such possibilities when developing the non-exclusion policy and deciding to allow a child with AIDS to attend school with uninfected children.<sup>228</sup>

Corporation Counsel Fritz Schwarz focused on experts’ scientific assessment of relative risk: Some risk is acceptable because there are no definite answers in medical science.<sup>229</sup> Knowledge changes. A “no risk” standard would grind public health to a halt.<sup>230</sup> New York City’s witnesses never claimed to have assessed every “what if” scenario. Dr. Polly Thomas, the city’s chief expert on pediatric AIDS, told the court “there wasn’t any need to have a complete guarantee about all future interactions.”<sup>231</sup> Commissioner of Health David Sencer spoke in public health terms, saying, “We have assigned a level of risk transmission by saliva to be so minimal that it does not have a practical implication.”<sup>232</sup> The child’s attorney, David Ellenhorn, tried to put the risk of transmitting AIDS in the classroom setting into perspective, reminding the court “[t]here is a theoretical risk that the ceiling will collapse, and indeed, ceilings in rooms have collapsed, but such far-fetched possibilities are not a proper basis for making policy.”<sup>233</sup>

Put simply, the two sides in *District 27* conceptualized risk contrarily. Parents and the community school districts sought guarantees. New York City’s public health officials could offer no absolutes. The parties’ different concepts of acceptable risk resulted in their talking past each other. The school districts wanted to know if AIDS could be transmitted in specific scenarios.

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*of a Patient with the Acquired Immunodeficiency Syndrome*, 326 LANCET 529 (1985) (the study).

<sup>222</sup> Nelkin & Hilgartner, *supra* note 198, at 122.

<sup>223</sup> See LEISS & POWELL, *supra* note 210, at 27 (describing the public assessment of risk).

<sup>224</sup> See Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 332.

<sup>225</sup> See Nelkin & Hilgartner, *supra* note 198, at 123.

<sup>226</sup> See Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 332.

<sup>227</sup> Nelkin & Hilgartner, *supra* note 198, at 123.

<sup>228</sup> *Id.*

<sup>229</sup> See KITTA, *supra* note 211, at 110.

<sup>230</sup> Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d., at 335 (quoting Dr. Louis Cooper, Chief of Pediatrics, St. Luke’s-Roosevelt Hospital Center). See PATEL & RUSHEFSKY, *supra* note 208, at 157 (describing the requirement of definitive proof as a barrier to public health).

<sup>231</sup> Nelkin & Hilgartner, *supra* note 198, at 123.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

Policymakers “dismissed the scenarios as irrelevant—so unlikely to spread the disease they did not merit consideration.”<sup>234</sup> Sullivan conceded “[t]he odds aren’t that great but . . . a parent is a funny kind of human being, and a parent isn’t much interested in odds.”<sup>235</sup> The Department of Health and Board of Education, on the other hand, had to make policy choices based upon scientific evidence and expert evaluations of risk. The parties’ differing notions of risk ensured the evidence concerning transmissibility of the virus that causes AIDS would be scrutinized with a microscope. Parents and the school districts opposed New York City policymakers’ evaluation of research on AIDS and its transmissibility. Each side pressed expert witnesses on the adequacy of evidence underlying the city’s decision to not automatically prohibit children diagnosed with AIDS from going to public schools.<sup>236</sup> Scientific uncertainty was on trial.<sup>237</sup>

Sullivan hammered experts on gaps in the medical and scientific understanding of AIDS transmissibility. Experts repeated that research was too new and could not rule out the possibility of HIV being spread at school.<sup>238</sup> Knowing the virus had recently been isolated in saliva and tears, Sullivan asked doctors to rule out transmission through biting.<sup>239</sup> Likely because proving a negative—that something will not occur—is impossible,<sup>240</sup> the experts’ answers were cautious. Such transmission was “probably low,” “certainly possible,” “highly, highly improbable,” “highly unlikely,” “beyond remote possibility,” according to the doctors.<sup>241</sup> But they could not rule out entirely transmission by saliva or tears. Experts likewise could not say definitively that the disease would not be transmitted by blood in a classroom setting.<sup>242</sup> “We don’t know the answers,” Sullivan argued, and “[t]hey don’t know the answers either.”<sup>243</sup> Sullivan thus contended that an oft-fatal disease, the transmissibility of which is uncertain, should not be allowed inside public schools.

In opposition, Schwarz cast AIDS research as demonstrating that “mere casual contact,” such as that occurring in schools, “does not present a risk” of transmitting the AIDS virus.<sup>244</sup> The city’s position was that uncertainty is part and parcel with the nature of scientific inquiry. According to Schwarz, experts demonstrated the risk of transmission by bites or blood spills was “essentially nonexistent” and “theoretical” at most.<sup>245</sup> To focus the court’s attention on the city’s interpretation of AIDS research as supporting the non-exclusion policy, New York City’s lawyers

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 124

<sup>236</sup> See Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 332-35.

<sup>237</sup> Nelkin & Hilgartner, *supra* note 198, at 124.

<sup>238</sup> *Id.* at 125 (highlighting expert testimony exemplifying uncertainty and a lack of concrete testing).

<sup>239</sup> *Id.*

<sup>240</sup> SCOTT D. HOLMBERG, SCIENTIFIC ERRORS AND CONTROVERSIES IN THE U.S. HIV/AIDS EPIDEMIC: HOW THEY SLOWED ADVANCES AND WERE RESOLVED 99 (2007).

<sup>241</sup> Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 332.

<sup>242</sup> *Id.* (maintaining the possibility of transmission via open wounds, such as those resulting from school fights or other playground accidents).

<sup>243</sup> *Arguments End in Suit on AIDS in City’s Schools*, N.Y. TIMES, Oct. 19, 1985, at 30.

<sup>244</sup> *Id.*

<sup>245</sup> Nelkin & Hilgartner, *supra* note 198, at 130.

deftly asked witnesses for both sides a question to which they could not say no: “Isn’t it a fact, Doctor, that there is not a single reported case in the medical literature in which AIDS has been demonstrated to have been transmitted other than A) by sexual intercourse with an infected person; B) by injection of contaminated blood or blood products; or C) by an infected mother to her child before or during birth?”<sup>246</sup>

Justice Hyman “empathize[d] with the fears and concerns of parents for the health and welfare of their children within the school setting,” but he ultimately rejected the community school boards’ focus on theoretical or hypothetical modes of transmission.<sup>247</sup> Instead, Justice Hyman highlighted consistencies in the evidence, much the same as had New York City. He wrote,

Despite positive cultures from a variety of body fluids of infected persons, there is *no concrete epidemiological evidence* to date that the virus has been transmitted through contact with the saliva or tears of infected persons . . . . Reinforced by the *total absence of documented cases* of HTLV-III/LAV having been transmitted in any way other than by sexual intercourse, by injection of contaminated blood or blood products, including needle sharing, or by an infected mother to her child before or during birth, the experts unanimously agree that the virus is not transmitted by casual interpersonal contact or airborne spread . . . . After almost five years of experience, the surveillance data . . . as well as epidemiologic studies of families that include AIDS patients and of health-care workers who have been exposed to AIDS patients, *speak strongly against* transmission of AIDS through casual (non-sexual) contact.<sup>248</sup>

The judge noted community school districts had “[t]hroughout this case . . . focused their point of attack on the reluctance of medical experts to unequivocally state with certainty” that AIDS could not be transmitted except by already identified routes. He answered by highlighting that “it is not in the nature of medical science to be governed by a ‘no risk’ standard.”<sup>249</sup> Justice Hyman acknowledged “the public, not recognizing the underlying medical tradition, is suspicious of the seeming uncertainty.”<sup>250</sup> Taking a swipe at the school districts’ barrage of hypotheticals that made classrooms seem awash with blood, urine, and feces, Justice Hyman wrote that he understood parental fears but was “duty bound to objectively evaluate the issue of automatic exclusion according to the evidence gathered and not be influenced by unsubstantiated fears of catastrophe.”<sup>251</sup>

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<sup>246</sup> *Id.* at 125.

<sup>247</sup> Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 335.

<sup>248</sup> *Id.* at 330-31 (emphasis added).

<sup>249</sup> *Id.* at 335.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

## 2. Making Policy in an Epidemic: Mutually Assured Distrust

The public's fears, however unsubstantiated, were a natural response to a policy sprung on them by officials whom they did not trust and who they believed did not trust them. Trust is fundamental to effective public health policymaking.<sup>252</sup> People tend to judge policy-related messages "first and foremost not by content but by source: *who is telling me this, and can I trust them?*"<sup>253</sup> Trust requires openness.<sup>254</sup> In the context of public health risks, the public "wants to hear . . . what those charged with risk management responsibility think ought to be done, and why."<sup>255</sup> When the responsible authorities have not adequately coordinated, do not effectively communicate with the public, or appear insensitive to the public's concerns, trust diminishes.<sup>256</sup> If the public does not trust the person or institution with policy-making responsibility, the public is not likely to trust the policy—however well-intentioned and rational it is.<sup>257</sup>

Mutual distrust between New York City officials and the public was a theme throughout the *District 27* trial. The city described its policy-making process as thoughtful, deliberate, evidence-based, and rational.<sup>258</sup> Centralized decision making was the most reasonable approach to a sensitive public health question involving civil rights of HIV-positive children. To open the process to the public would invite politics and emotion into the policy-making process. The city argued that the Department of Health's policy was "the more conservative approach" and took into account "essentially nonexistent" risks, such as biting and nosebleeds.<sup>259</sup> Board of Education Chancellor Nathan Quinones and Department of Health Commissioner David Sencer explained the city needed a uniform policy on schoolchildren with AIDS, overseen by citywide agencies.<sup>260</sup> Schwarz contended the centralization of such policies was mandated by the state legislature, whose "judgment [was] to keep those somewhat emotional, potentially enormously divisive issues of what to do with someone who is different . . . out of the local authorities' hands."<sup>261</sup> Secrecy was the means to the legislature's end.

The school districts' attorney, Robert Sullivan, lashed out at city officials for bureaucratic arrogance and disdain for the public. He described Sencer as "authoritarian" and unwilling "even to discuss" the non-exclusion policy or decision to allow a child infected with the AIDS virus into the classroom.<sup>262</sup> Sullivan cast Quinones as a puppeteer atop the "terrible

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<sup>252</sup> See BENNETT, *supra* note 207, at 3; KITTA, *supra* note 21110, at 115-18.

<sup>253</sup> BENNETT, *supra* note 207, at 3.

<sup>254</sup> *Id.* at 4.

<sup>255</sup> LEISS & POWELL, *supra* note 210, at 223.

<sup>256</sup> Vincent T. Covello, *Informing People About Risks from Chemicals, Radiation, and Other Toxic Substances: A Review of Obstacles to Public Understanding and Effective Risk Communication*, in PROSPECTS AND PROBLEMS IN RISK COMMUNICATION 4-5 (William Leiss ed., 1989).

<sup>257</sup> See Ropeik, *supra* note 210, at 1033.

<sup>258</sup> Nelkin & Hilgartner, *supra* note 198, at 123-27 (describing the city's policy approach).

<sup>259</sup> Nelkin & Hilgartner, *supra* note 198, at 130.

<sup>260</sup> *Id.* at 132.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 131.

monument called 110 Livingston Street,” where the Board of Education was located.<sup>263</sup> Sullivan maintained these two bureaucrats had developed the non-exclusion policy entirely shielded from public scrutiny, all the while treating local school boards as adversaries. That is why, Sullivan argued, they “waited until 36 hours before school opened” before announcing a child with AIDS would attend school—to force that decision down everybody’s throat.<sup>264</sup> Sullivan contended that city officials were “big government . . . taking over” local matters.<sup>265</sup> Whether parents and community school districts did not trust the central city policymakers or vice-versa, it is clear trust between New York City’s public health and education policymakers and the public had broken down.

During the trial Justice Hyman lectured Quinones that had the city’s policy guidelines been in place earlier, “you would not be in the courtroom today.”<sup>266</sup> In the court’s opinion, the Decentralization Law, which delegated some authority over schools to the community school districts, did not mandate prior consultation on the non-exclusion policy.<sup>267</sup> Nevertheless, prior consultation was “implied from the spirit” of that law.<sup>268</sup> Ultimately, Justice Hyman “admonished” the central Board of Education for “abdication of their public responsibility to the court.”<sup>269</sup> According to Justice Hyman, New York City officials openly distrusted the public’s ability to act reasonably in public health decision making and failed to disclose “routine” information.<sup>270</sup> The failure to engage with the public, at least through the community school boards, “besp[oke] the hostile attitude historically displayed towards community participation.”<sup>271</sup> The breakdown in trust had cast doubt on the non-exclusion policy and subsequent decision to allow a child diagnosed with AIDS to attend public school. Nevertheless, Justice Hyman held that distrust and “the fact that some laypeople, both learned and unlearned, and some physicians of great skill and repute, may differ” in their beliefs as to the possibility of AIDS transmission in the school setting “[are] not reason[s] enough to declare the Commissioner’s policy to be without consideration or in disregard of the facts.”<sup>272</sup>

### 3. The Wall Comes Tumbling Down: Department of Health Doctor, Mother of Two

The AIDS doctors and researchers who testified at the *District 27* trial painstakingly detailed a wide range of issues related to the syndrome, including the newly discovered AIDS-causing virus’s properties, the disease’s epidemiology and transmissibility, theoretical and hypothetical risks posed by infected children in the classroom, and findings from

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<sup>263</sup> KIRP, *supra* note 4, at 124.

<sup>264</sup> Nelkin & Hilgartner, *supra* note 198, at 133.

<sup>265</sup> COLGROVE, *supra* note 218, at 139.

<sup>266</sup> KIRP, *supra* note 4, at 122.

<sup>267</sup> Opinion in Full, at 40–41, Dist. 27 Cmty. Sch. Bd.

<sup>268</sup> *Id.* at 40.

<sup>269</sup> *Id.*

<sup>270</sup> *See id.* at 81–82.

<sup>271</sup> *Id.* at 41–42.

<sup>272</sup> Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 335.

contemporaneous and unpublished medical studies.<sup>273</sup> Schwarz and Sullivan drew out the strengths and weaknesses of AIDS research, both in the court of law and court of public opinion. Justice Hyman would decide whether the policy was legally viable, but the people of New York City would ultimately get to decide whether it was politically viable during the November 5, 1985, mayoral election.

From the outset, Schwarz resolved to speak at least twice a day with media, including television crews, to further his goal of educating the public.<sup>274</sup> Sullivan did the same.<sup>275</sup> Although the lawyers used the public eye to posture, they summarized and characterized the experts' testimony, thereby transmitting knowledge about the disease to the people. The public, particularly parents, paid attention. Take Carol Bouchard for example. She had two daughters in New York City public schools but did not know whether the school boards or city was correct. Like other parents, Bouchard attended many of the *District 27* hearings, hoping to get answers. Speaking to a reporter midway through the trial, Bouchard said, "Some facts that came out today answered the questions I had from yesterday, and I hope answers that come out tomorrow will answer the questions I have today."<sup>276</sup> Schwarz and Sullivan had become "educators"; Justice Hyman, "schoolmaster to the city."<sup>277</sup> The court's noble cause was succeeding.

For Justice Hyman, "When I found out that AIDS could not be transmitted by casual contact, my fears about contagion went up in smoke."<sup>278</sup> The experts' testimony had convinced the judge that while the city's decision-making process was flawed, its decision was not. In the public's mind, however, the trial's climax occurred during Robert Sullivan's cross-examination of Dr. Polly Thomas, the pediatric AIDS specialist who worked for the New York City Department of Health. Thomas was also the mother of two small children. When Thomas testified she "considered it unlikely" the AIDS virus could be transmitted through a child's bite, Sullivan attempted to back her into a corner. Speaking in the context of children biting one another at school, Sullivan asked Thomas, "If your child was bitten . . . would you want to have your child have that blood test as a precaution, to know if your child had contracted the AIDS virus?"<sup>279</sup> Sullivan expected the doctor to announce the policy for her home was different from the policy for New York City schools; however, Thomas had thought this question through already and determined she did not want to live in a world where every scrape requires a blood test.<sup>280</sup> Her response to Sullivan's hypothetical was an unqualified, "I would not." The spectator gallery gasped in shock.<sup>281</sup>

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<sup>273</sup> See, e.g., Schwarz & Schaffer, *supra* note 92, at 166; Robert D. McFadden, 2 *Experts Testify They Oppose Allowing AIDS Child in School*, N.Y. TIMES, Sept. 14, 1985, at A27; KIRP, *supra* note 4, at 94-132.

<sup>274</sup> Telephone Interview with Frederick A. O. Schwarz, Jr. (Dec. 4, 2014).

<sup>275</sup> See Joseph P. Fried, *Reporter's Notebook: Few Answers in AIDS Suit*, N.Y. TIMES, Sept. 23, 1985, at B5 (discussing how Schwarz and Sullivan met with reporters during most trial breaks).

<sup>276</sup> *Id.*

<sup>277</sup> KIRP, *supra* note 4, at 96.

<sup>278</sup> *Id.* at 126.

<sup>279</sup> Fried, *supra* note 27572.

<sup>280</sup> Telephone Interview with Pauline A. Thomas, M.D. (Mar. 6, 2015).

<sup>281</sup> Fried, *supra* note 275.



*D. Resolution: A Most Meticulous Opinion*

The *District 27* trial ended in October 1985, but the court did not issue its opinion until February 1986. Schwarz later recalled, “Everyone was sure that we were going to lose.”<sup>282</sup> A poll taken in 1985 showed a majority of New Yorkers wanted the city to lose.<sup>283</sup> Even among political elites, sentiment ran against the non-exclusion policy: Mayor Koch hosted a dinner at Gracie Mansion during the trial, and he informally polled the guests about the city’s position. The only people who supported the city’s position were Schwarz, his wife, and historian Robert Caro. According to Schwarz, other guests, including media mogul Rupert Murdoch and his wife, worried the city’s position would endanger children’s lives.<sup>284</sup> However, at least one person was not sure the city would lose—Robert Sullivan. He recalled that before the trial was over, Justice Hyman told him the schools were going to lose but the public education was not complete. So the trial went on.<sup>285</sup>

In February 1986, the court released its eighty-two page opinion. *District 27* was the first case in the United States to explore factual and legal issues relating to AIDS in such depth.<sup>286</sup> As a threshold matter, Justice Hyman upheld New York City’s non-exclusion policy as not arbitrary and capricious, meaning the policy was on solid footing.<sup>287</sup> Although Hyman’s legal analysis could have ended there, the judge went beyond what was strictly required to uphold the city’s non-exclusion policy. Sending a signal to policymakers and other courts, Hyman analyzed New York City’s policy in light of the U.S. Constitution’s Equal Protection Clause and federal statutory rights provided by the Rehabilitation Act of 1973. He ruled that had New York City excluded children with AIDS from public schools, such a policy would have violated the children’s constitutional and statutory rights.<sup>288</sup> Hyman’s far-reaching analysis of federal rights influenced many later court cases,<sup>289</sup> but the judge’s opinion in *District 27* went even further.

True to his goal of educating the public, Justice Hyman’s *District 27* opinion methodically and meticulously summarized the then-current state of AIDS research. In the five-and-a-half pages he deemed an “Introduction” to his opinion, Hyman explained what AIDS is: “AIDS is a clinical diagnosis of a disease complex characterized by a collapse of the body’s natural immunity against disease.” He continued, “There is no known cure for AIDS at present,” but a newly discovered retrovirus had been identified as “the probable causative agent responsible for AIDS.” Hyman detailed the virus’s clinical progression from initial infection through incubation, presentation of AIDS symptoms, and, eventually, death. In essence, Hyman wrote a

<sup>282</sup> KIRP, *supra* note 4, at 123 (quoting Schwarz).

<sup>283</sup> Brian Kates, *AIDS Ban Rates High: Children With Virus Should Stay Home*, N.Y. DAILY NEWS, Sept. 19, 1985, at 3.

<sup>284</sup> See Schwarz Oral History, *supra* note 119, at 3:246-47 (recalling the dinner and poll).

<sup>285</sup> Telephone Interview with Robert Sullivan (Mar. 23, 2015).

<sup>286</sup> See Schwarz & Schaffer, *supra* note 92, at 167.

<sup>287</sup> Reported Opinion, Dist. 27 Cmty. Sch. Bd., 502 N.Y.S.2d at 335.

<sup>288</sup> *Id.* at 337.

<sup>289</sup> See, e.g., *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 381 (C.D. Cal. 1986) (citing *District 27* in holding that a child with AIDS is a “handicapped person” under the Rehabilitation Act); *Doe v. Dolton Elementary Sch. Dist.* No. 148, 694 F. Supp. 440, 445 (N.D. Ill. 1988) (the same); *Johnetta J. v. Mun. Ct.*, 267 Cal. Rptr. 666, 682 (Cal. Dist. Ct. App. 1990) (referencing *District 27*’s equal protection holding).

public health pamphlet on AIDS, based on testimony at trial and using language generally accessible to the public—all before even mentioning the case before him. “In short, it is the HTLV-III/LAV virus, and the syndrome known as AIDS,” Hyman wrote in his introduction, “that is contagious or transmissible, infiltrating and sabotaging the body’s center for disease control, fomenting chaos and immunological anarchy.” A virus—something the public could relate with.<sup>290</sup>

#### IV. *DISTRICT 27’S* DENOUEMENT: WHEN SCIENCE, LAW, POLICY, AND POLITICS CONVERGE

New York City’s policy of non-exclusion and its successful defense in *District 27* helped pave the way for school districts across the United States to similarly adopt policies allowing HIV-positive children to attend public schools. By taking a deep, critical look into the best available medical science and research, *District 27* established the dearth of evidence that AIDS was casually transmissible in the school setting. The case helped bring AIDS from society’s fringes into the forum of public discussion. It remains a learning tool for understanding how public health and politics often collide—and how policymakers can soften the impact.

Public health policy broadly includes law, regulation, agency guidelines, budget priorities, and judicial determinations.<sup>291</sup> It is primarily aimed at preventing and controlling disease and promoting the health of the populace.<sup>292</sup> Ideally, public health policy is based on the best available science.<sup>293</sup> In practice, the policy-making process “is complex and depends on a variety of scientific, economic, social, and political forces.”<sup>294</sup> Adding to the complexity is a democratic paradox,<sup>295</sup> which makes litigation likely. The state’s police power, meaning its power to restrict individual freedom in pursuit of public welfare, runs against constitutionally protected individual rights,<sup>296</sup> yet the public relies on the state to protect individuals from harms they cannot themselves fend off.<sup>297</sup> Legally, the state has a great deal of power to restrict individual rights to protect the public health.<sup>298</sup> Politically, however, policymakers may be more constrained.<sup>299</sup> As a result, public health officials “must constantly struggle to balance the interests of the community

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<sup>290</sup> Opinion in Full at 1-6, Dist. 27 Cmty. Sch. Bd.

<sup>291</sup> Ross C. Brownson, Jamie F. Chiqui & Katherina A. Stamatakis, *Policy, Politics, and Collective Action: Understanding Evidence-Based Public Health Policy*, 99 AM. J. PUB. HEALTH 1576, 1576 (2009).

<sup>292</sup> PATEL & RUSHEFSKY, *supra* note 208, at 37.

<sup>293</sup> *Id.* at 146-50; Edward P. Richards & Donald C. Bross, *Legal and Political Aspects of STD Prevention: Public Duties and Private Rights*, in SEXUALLY TRANSMITTED DISEASES 2039 (King K. Holmes et al. eds., 4th ed. 2008).

<sup>294</sup> Brownson, Chiqui & Stamatakis, *supra* note 291, at 1576.

<sup>295</sup> See LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 11 (2008) (describing the paradox).

<sup>296</sup> See Richards & Bross, *supra* note 293, at 2039; GOSTIN, *supra* note 295, at 47-59.

<sup>297</sup> Richards & Bross, *supra* note 293, at 2039.

<sup>298</sup> *Id.* See generally Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329 (1989).

<sup>299</sup> PATEL & RUSHEFSKY, *supra* note 208, at 35-40.

as a whole . . . and individual autonomy.”<sup>300</sup>

One example of the democratic paradox occurred in the early days of the AIDS epidemic, when public health officials moved to close bathhouses. Bathhouses were, in essence, social clubs where men could go to engage in sex with other men.<sup>301</sup> They were hotbeds for pestilent behavior.<sup>302</sup> Epidemiologically, the question was not difficult to answer. Sexual behavior in bathhouses, including multiple sex partners in a single visit, allowed for explosive transmission of sexually transmitted diseases, including AIDS.<sup>303</sup> People who went to bathhouses “simply were more likely to be infected with a disease—and infect others—than a typical homosexual on the street.”<sup>304</sup> Despite public education on safe sex practices, a small minority of men continued to patronize bathhouses and engage in unprotected sex with multiple partners.<sup>305</sup> Bathhouses were indisputably conduits for AIDS transmission. Nevertheless, some gay activists saw closing the bathhouses as dialing back civil rights victories for the LGBT community.<sup>306</sup> In cities like San Francisco and New York, activists organized against proposals to close them. Political activism effectively limited public health from acting quickly to respond to the clearly demonstrated link between AIDS transmission and sexual encounters at bathhouses.<sup>307</sup> As AIDS pioneer Dr. Anthony Fauci later wrote, “[I]t was impossible to separate HIV science from HIV policy” in the early to mid-1980s.<sup>308</sup>

Law, public health policy, medicine, politics, and social values converged in *District 27*. That the convergence occurred in public primary school only made the situation more volatile. New York City officials were in a no-win scenario. To automatically exclude children from public schools would have brought allegations of civil rights violations. To not automatically exclude the children resulted in a lawsuit alleging, in effect, New York City was putting children who were not infected with HIV at risk. To remain silent was not an option because Mayor Ed Koch was in the middle of a reelection campaign and being pressed on the issue by reporters.

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<sup>300</sup> *Id.* at 38.

<sup>301</sup> See SHILTS, *supra* note 16, at 152-54. See generally Samantha J. Walker, *The New York City Bathhouse Battles of 1985: Sex and Politics in the AIDS Epidemic* (Apr. 2010) (unpublished honors thesis, Rutgers University), available at <http://history.rutgers.edu/honors-papers-2010/224-the-new-york-city-bathhouse-battles-of-1985/file>.

<sup>302</sup> SHILTS, *supra* note 16, at 19-20; Anthony S. Fauci, *AIDS: Reflections on the Past, Considerations for the Future*, in *AIDS AND THE PUBLIC DEBATE: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 67, 71 (Caroline Hannaway et al. eds., 1995); JAMES CHIN, *THE AIDS PANDEMIC: THE COLLISION OF EPIDEMIOLOGY WITH POLITICAL CORRECTNESS* 63-64, 144-45 (2007).

<sup>303</sup> See CHIN, *supra* note 302, at 145.

<sup>304</sup> SHILTS, *supra* note 16, at 19.

<sup>305</sup> Mervyn F. Silverman & Deborah B. Silverman, *AIDS and the Threat to Public Health*, 15 *HASTINGS CTR. REP.* 4 (Aug. 1985), at 22.

<sup>306</sup> SHILTS, *supra* note 16, at 19; Victoria A. Harden, *Acquired Immune Deficiency Syndrome (AIDS): History and Time Line*, in *ESSENTIALS OF PUBLIC HEALTH BIOLOGY: A GUIDE FOR THE STUDY OF PATHOPHYSIOLOGY*, at 327 (Constance Urciolo Battle ed., 2009); Fauci, *supra* note 302, at 71.

<sup>307</sup> See PATEL & RUSHEFSKY, *supra* note 208, at 146-50; Richards & Bross, *supra* note 293, at 1441. The efficacy of closing bathhouses to combat AIDS transmission is beyond the scope of this analysis, but there are many good points on each side of the issue.

<sup>308</sup> Fauci, *supra* note 302, at 71.

Regardless of New York City's policy, litigation was inevitable. Knowing litigation was inevitable, however, should have prompted public health officials to consider whether decide-announce-defend or engage-interact-cooperate would lead to a better result. City officials chose the former course of action and left public health education to Corporation Counsel Fritz Schwarz, who masterfully used the courtroom as a classroom. Nevertheless, educating the public after the fact and through the adversarial legal process seems indirect at best. Had New York City officials chosen to engage, interact, and cooperate with the public during the decision-making process, much of the *District 27* trial could have been avoided.

What does *District 27* teach about policymaking involving contentious social issues such as AIDS? First, courtrooms must sometimes become classrooms and lawyers may have to educate both the fact finder and public at large. Second, a level of scientific uncertainty is tolerated in public policy matters. Third, reflexive secrecy in the decision-making process may undermine even the best public policies. Although the *District 27* opinion addresses each proposition, the opinion's focus on secrecy and democratic ideals is worthy of critical elaboration and comparison with public policy best practices.

*A. Balancing Secrecy and Transparency in Public Policy: Democratic Idealism*

If governments in the United States "deriv[e] their just powers from the consent of the governed"<sup>309</sup> and consent "is not meaningful unless the governed are informed about their government and its leaders,"<sup>310</sup> could New York City officials justify the secret decision-making process that resulted in the non-exclusion policy at issue in *District 27*?

Justice Hyman seemed to think not. He too recognized the fundamental idea that "consent of the people" implies "the people have the right to know what these officials are doing." He castigated the city for "tak[ing] great pains to establish that the letter of [New York's public access laws] does not apply in this case," all the while "miss[ing] the spirit of the law."<sup>311</sup> As often happens when a coterie of government officials develops policy in secret, New York City officials' well-intentioned purpose backfired. "Instead of educating and inspiring the confidence and trust of the public, respondents left them frustrated and hostile in the face of such an emotionally charged issue," Hyman wrote. "It is these public officials themselves who predictably, although perhaps unwittingly, let loose the forces of anxiety and fear."<sup>312</sup>

Justice Hyman characterized city officials as working under the "notion that they knew what was best and would make all the decisions for everyone's good. Believing this, they acted in imperious fashion . . . behind a cloak of secrecy."<sup>313</sup> Indeed, "[n]ot one word about the policy that was taking shape" escaped; and no information "was passed along to the community school boards during all these months."<sup>314</sup>

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<sup>309</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>310</sup> FREDERICK A. O. SCHWARZ, JR., *DEMOCRACY IN THE DARK: THE SEDUCTION OF GOVERNMENT SECRECY* 18 (2015). Disclaimer: The author worked closely with Schwarz as the primary research assistant for *Democracy in the Dark*.

<sup>311</sup> Opinion in Full, at 80, Dist. 27 Cmty. Sch. Bd.

<sup>312</sup> *Id.* at 81.

<sup>313</sup> *Id.* at 80.

<sup>314</sup> KIRP, *supra* note 4, at 105.

Why such secrecy? Perhaps city officials were seduced by secrecy's promise of efficiency. After all, acting in secret "seems easier and faster . . . limits challenges and pesky questions . . . [and] fosters illusions of grandeur."<sup>315</sup> According to Deputy Chancellor of Education Joseph Sincenti, New York City was "setting the precedent for the country. Never mind that we catch all the flack. We're doing the right thing."<sup>316</sup> Of course, secrecy often is necessary. Public health policies, especially those fraught with social and political value implications, need to be carefully considered to balance public welfare, individual rights, and best-available scientific data.<sup>317</sup> While the committee's secrecy was justifiable—public hearings could risk the public health decision becoming a political one—the mayor's silence was not. Had local school boards or principals on the ground in New York City schools been aware the city was developing a policy on schoolchildren with AIDS, the likelihood of a vitriolic public reaction might well have been reduced. The local boards would have become a part of the process, thereby increasing locals' trust of the city's policy. Furthermore, they would have been armed with the same data as city officials, which would have allowed local district officials to become a conduit for educating parents and teachers about AIDS.

Transparency in policymaking has a cathartic effect. As Fritz Schwarz would later write in a law review article with Eric Lane, sunshine in policymaking helps "diminish any sense that [policymakers are] 'acting upon' rather than 'acting for' the public."<sup>318</sup> To be fair, Schwarz and Lane were discussing the value of transparency in rewriting the New York City Charter—its constitution—over the course of a year in 1989. Nevertheless, the principle remains: Transparency and public debate "make[] narrow-minded views more difficult to express," "sharpen[] [internal debate] because of . . . public feedback," and help make final policy "different and better" than earlier proposals because "we all need to learn, we all need to grow, we all need to develop, we all need to improve our ideas, and . . . we will learn from the wider New York City public."<sup>319</sup> And the public will learn from the policymaking process.

Such openness did not occur in 1985. Mayor Koch kept the public and local school boards in the dark. There was no information feedback. There was no learning. As Justice Hyman put it in the final paragraph of his opinion in *District 27*,

The result was a five-week trial during which [the] court, with the able assistance of eminent counsel, attempted to fill the educational void by surfacing information which should have been provided to the public as a matter of routine. Had the public officials involved trusted the people, much of this trial could have been avoided. In a democracy, unanimity is never to be expected. However, open forthright conduct by public officials should avoid much of the distress and acrimony which has surrounded this litigation.<sup>320</sup>

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<sup>315</sup> SCHWARZ, *supra* note 310, at 40.

<sup>316</sup> KIRP, *supra* note 4, at 105.

<sup>317</sup> See LEISS & POWELL, *supra* note 210, at 213-26; PATEL & RUSHEFSKY, *supra* note 208, at 152-56.

<sup>318</sup> Frederick A. O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723, 755 (1998).

<sup>319</sup> *Id.* at 756 (internal parentheses and ellipses omitted).

<sup>320</sup> Opinion in Full, at 82, Dist. 27 Cmty. Sch. Bd.

*B. Balancing Secrecy and Transparency in Public Policy: Evidence-Based-Policy Realism*

Justice Hyman's analysis of the policy-making process in *District 27* is apt but unavailing. Democratic values are inherently fluid. Precisely because government derives its powers from the people it represents, the state can hardly sit idly by in the face of a public health threat and allow the democratic process to determine a course of action. The state must act swiftly, based on expertise, to protect the general welfare.<sup>321</sup> But policymakers must be cognizant of the social and political aspects of their decisions.

1. The New York City Trust Deficit

In 1985, New York City policymakers faced a serious trust deficit. Ed Koch and David Sencer were being hammered on all sides for the city's response to AIDS. Among the gay community, New York City was not doing enough to combat the disease and shield AIDS victims from discrimination. When public health officials did attempt to provide for AIDS victims—for example, when the city attempted to transfer to a Queens nursing home ten AIDS patients who were “too sick to go home and not sick enough to be hospitalized”—local communities accused officials of exposing them to a “dire health threat.”<sup>322</sup>

Further complicating the picture was friction between the New York City Board of Education and local community school districts. Decentralization of the city's school system had divided decision-making between the Board of Education, which was empowered to make policy on issues with citywide impact, and local school boards, which were to be responsive to local concerns.<sup>323</sup> By the mid-1980s, many people accused the local boards of being too political and prone to abuse and excess. The local boards and many parents believed the Board of Education was bureaucratic, cold, and unresponsive to community needs.<sup>324</sup> Indeed, at the height of the AIDS crisis, New York City officials were skeptical that the public would respond rationally to any AIDS policy, and the public did not trust that “arrogant New York City bureaucrats” were not simply “bullying the citizenry.”<sup>325</sup>

New York policymakers had an uphill battle from the start; however, some factors within city officials' control could have boosted trust in public health officials and alleviated many of the fears that made the non-exclusion policy so contentious. First, citywide public officials tapped to develop New York City's policy regarding schoolchildren diagnosed with AIDS operated behind

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<sup>321</sup> See Richards & Bross, *supra* note 293, at 1442–43 (discussing the need for responsive public health actions).

<sup>322</sup> *Queens Residents Up In Arms Over AIDS Patients Transfer*, AP NEWS ARCHIVE, Aug. 15, 1985, available at <http://www.apnewsarchive.com/1985/Queens-Residents-Up-in-Arms-Over-AIDS-Patients-Transfer/id-3739959225d52682d5978212b5f051a6>; See Joyce Purnick, *Koch Won't Put AIDS Patients in Queens Site*, N.Y. TIMES, Sept. 4, 1985, at B3.

<sup>323</sup> KIRP, *supra* note 4, 102.

<sup>324</sup> See *Overhauling School Decentralization*, Editorial, N.Y. TIMES, Jan. 2, 1989, at 22; Leonard Buder, *Decentralization of Schools Provides Painful Lessons*, N.Y. TIMES, Dec. 11, 1988, at E6; JOE WILLIAMS, *CHEATING OUR KIDS: HOW POLITICS AND GREED RUIN EDUCATION* 134–35 (2005); KIRP, *supra* note 4, at 102.

<sup>325</sup> KIRP, *supra* note 4, at 122.

a veil of secrecy, keeping even local school boards in the dark. Second, the secret decision-making process precluded the city from assessing parents' values and meaningfully educating them before the policy was announced.

## 2. Build Trust Through Transparency

Distrust can hamper even the most responsible public health policies.<sup>326</sup> People want to know about public health risks.<sup>327</sup> Although a particular individual will perceive a risk uniquely depending on his or her life circumstances,<sup>328</sup> people are generally more accepting of risks and uncertainty if they know what public health authorities think should be done and why.<sup>329</sup> On the other hand, secrecy fosters distrust and doubt.<sup>330</sup> Distrust and doubt lead to suspicion: If there is nothing to hide, why fear transparency? Suspicion, apprehension, and concern for safety "feeds upon itself and . . . may be amplified to the point where credible and pertinent information makes no difference" to the public.<sup>331</sup>

To build and maintain trust throughout the policymaking process, officials should adopt a presumption of openness.<sup>332</sup> But transparency is not a hothouse plant. It cannot be transplanted the same into every policymaking process, without consideration of context.<sup>333</sup> A presumption of openness does not mean the entire decision-making process should be carried out in public hearings. To do so likely would grind public health to a halt and create undue politicization of the policymaking process. Nevertheless, public health officials must think ahead to decide "when and how to engage with external stakeholders."<sup>334</sup> From April to August 1985 in the New York City Department of Health, Board of Education, and City Hall, such thinking apparently never occurred. If such thinking did occur, it wrongly resulted in a black-box decision-making process.

When was the appropriate time to involve the public in the policymaking process? Between mid-July and the first week of August 1985 at the latest. By that time, Department of Health experts had been gathering evidence and contemplating the appropriate policy for more than six months.<sup>335</sup> By that point, Commissioner of Health David Sencer knew the substance of the U.S. Centers for Disease Control's forthcoming policy guidelines.<sup>336</sup> The Board of Education had been consulting with the Department of Health to develop the policy for more than six weeks,

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<sup>326</sup> See BENNETT, *supra* note 207, at 3-4 (discussing trust in decision-making).

<sup>327</sup> KITTA, *supra* note 211, at 115.

<sup>328</sup> Ropeik, *supra* note 210, at 1030.

<sup>329</sup> See LEISS & POWELL, *supra* note 210, at 223; KITTA, *supra* note 211, at 115.

<sup>330</sup> KITTA, *supra* note 211, at 115-16.

<sup>331</sup> LEISS & POWELL, *supra* note 210, at 214.

<sup>332</sup> See, e.g., BENNETT, *supra* note 207, at 4.

<sup>333</sup> The hothouse plant metaphor draws upon Giuseppe Di Palma, TO CRAFT DEMOCRACIES: AN ESSAY ON DEMOCRATIC TRANSITIONS 14 (1990).

<sup>334</sup> BENNETT, *supra* note 207, at 18 (original emphasis removed).

<sup>335</sup> See *supra* notes 92-97 and accompanying text (discussing Dr. Polly Thomas's reports from a pediatric AIDS conference).

<sup>336</sup> KIRP, *supra* note 4, at 108.

and the policy was substantively complete.<sup>337</sup> Sencer later contended decision makers were not unanimous during the policymaking process and that “it made no sense to wash our dirty linen in public.”<sup>338</sup> Although plausible, such distrust of the public only feeds public distrust of policymakers and, therefore, the policies they make. Indeed, studies have shown policymakers can increase trust by “[a]dmitting to uncertainty, or facilitating public understanding of science as a ‘process.’”<sup>339</sup> Given that New York City’s central authorities already faced a trust deficit in 1985 and the public was becoming increasingly frightened of AIDS,<sup>340</sup> some public outcry over the city’s mere consideration of allowing a child with AIDS into public school was inevitable. Nevertheless, policymakers must recognize transparency’s potential for building public trust.

Had New York City officials been more transparent, public health and school authorities could have educated the public during the summer before school began. Instead, policymakers left the city’s lawyer to defend the non-exclusion policy and educate the public after the fact. In doing so, policymakers undermined the public’s trust in the policy and its scientific basis. As Dr. Louis Cooper, a witness for New York City, put it at trial, “If one of the expected outcomes of any public process is public trust and comfort and security about outcome, then, in hindsight, that process didn’t achieve that goal.”<sup>341</sup>

How should New York City have engaged the public? Public hearings would have risked inappropriate political influences in what was essentially a public health question. Notice-and-comment rulemaking was one option, although facing an accelerated decision-making timeline may have made that process less viable. At the least, once they had assembled evidence and sketched out New York City’s policy, the Board of Education and Department of Health could and should have announced the question of whether children diagnosed with AIDS would be allowed in public schools was on the table. Although Sencer mentioned the issue in a July 1 *New York Times* interview, he never followed up with the public discourse he promised. The people in a democracy have a right to be informed. Had city officials announced a joint committee of the Board of Education and Department of Health had been considering a non-exclusion policy, they could have communicated the evidence upon which the committee based its draft policy. But once the policy was final, the public was “unlikely to be assuaged simply by reassurance” from experts and policymakers about the risk (or lack thereof) posed by a schoolchild with AIDS.<sup>342</sup> During the summer, the public was hungry for information. Sencer failed to use his bully pulpit to feed them relevant information. His one reported statement in July was that the policy discussion would necessarily involve the public.<sup>343</sup> That never happened.

Risks are more acceptable when policymakers explain what might happen, acknowledge public fears, explain what evidence would exist if the feared risk existed, and describe how sound medical science has not found that evidence.<sup>344</sup> Involving the public as a whole was not the only

<sup>337</sup> See *supra* notes 98-111 and accompanying text.

<sup>338</sup> KIRP, *supra* note 4, at 105.

<sup>339</sup> L. J. Frewer, *et al.*, *What Determines Trust in Information About Food-Related Risks? Underlying Psychological Constructs*, 16 RISK ANALYSIS 473, 484 (1996).

<sup>340</sup> See Part B.1.

<sup>341</sup> Nelkin & Hilgartner, *supra* note 198, at 133.

<sup>342</sup> See BENNETT, *supra* note 207, at 15.

<sup>343</sup> Jane Gross, *AIDS Children Struggle with Tragic Legacy*, N.Y. TIMES, July 1, 1985, at A1.

<sup>344</sup> *Id.*; see also KITTA, *supra* note 211, at 115.



way to pursue transparency. New York City's public school decentralization had created a system for ensuring, through local board elections, the public would have representatives in school governance. To reduce the chance of over politicizing the policymaking process, the Board of Education and Department of Health could have involved the community school boards. The community school boards, in turn, would have been poised to educate and disseminate information to parents once the citywide policy was finalized and announced. Although not every public health decision will have a built-in mechanism for involving the public or their representatives, New York City did. City officials should have utilized it.

### 3. Value Public Values

Transparency is a first step, but it should be paired with meaningful consideration of public concerns. The virtuous decision is not always going to be politically popular. Policymakers must be forward thinking and assess difficulties in advance.<sup>345</sup> To ignore the public altogether or simply assume the public is not fit to rationally discuss a health policy vis-à-vis the risk to which it pertains may endanger the policy by amplifying anxieties and mistrust.<sup>346</sup> Even the best-intentioned public health policies with strong scientific bases may be opposed by people who perceive the policies as adversely affecting them.<sup>347</sup> Simply put, the public may have fears that do not comport with public health experts' views of the relevant risks.<sup>348</sup> It is not enough to rely on scientific objectivity and simply write off the public as irrational. Neither is it correct to act on the assumption that laypeople would change their perceptions of risk if only they "knew more about science and ceased to be in a state of a knowledge deficit."<sup>349</sup>

Policy officials and public health experts must consider what the affected public cares about.<sup>350</sup> Officials and experts who "fail[] to anticipate common misunderstandings . . . can inadvertently reinforce them."<sup>351</sup> It may be that the public's concerns stem from insufficient knowledge to evaluate a potential public health risk, in which case officials can identify the misperceptions and correct them through education.<sup>352</sup> Or the public may understand the scientific basis for a public health policy but reject it on an ethical or moral basis,<sup>353</sup> in which case officials can develop messaging that best responds to public concerns or work with affected people to reach a mutually acceptable policy.<sup>354</sup> In either instance, public health policymakers must meaningfully involve the public to some degree in public health matters in order to bridge the gap

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<sup>345</sup> BENNETT, *supra* note 207, at 18.

<sup>346</sup> See LEISS & POWELL, *supra* note 210, at 221.

<sup>347</sup> See PATEL & RUSHEFSKY, *supra* note 208, at 149; Ropeik, *supra* note 210, at 1033 (noting that "the more we perceive a benefit from any given choice, the less fearful we are of [its] risk"); KITTA, *supra* note 211, at 110-12.

<sup>348</sup> Ropeik, *supra* note 210, at 1033.

<sup>349</sup> CHRIS MOONEY, DO SCIENTISTS UNDERSTAND THE PUBLIC? 2 (2010) (original emphasis removed).

<sup>350</sup> See, e.g., Richard C. J. Somerville & Susan Joy Hassol, *Communicating the Science of Climate Change*, PHYSICS TODAY (October 2011) 48, 52 (discussing risk communication and climate change).

<sup>351</sup> *Id.* at 51.

<sup>352</sup> MOONEY, *supra* note 349, at 2.

<sup>353</sup> *Id.*

<sup>354</sup> Ropeik, *supra* note 210, at 1033.

between experts and laypeople.<sup>355</sup> It is critical that policymakers “[a]ccept and involve the public as a partner” in public health matters.<sup>356</sup> And doing so, as Justice Hyman implied in *District 27*, fosters informed discussions crucial to democracy.<sup>357</sup>

The U.S. public was not sympathetic to AIDS victims in 1985. A nationwide poll in December found 1 in 3 Americans favored quarantining people diagnosed with AIDS, while 1 in 7 supported tattooing AIDS victims with a sort of permanent scarlet letter.<sup>358</sup> Regarding the formation of the non-exclusion policy, a high-ranking New York City official explained, “We weren’t going to do this by votes.”<sup>359</sup> Policymakers excused their opacity as resulting from “not wanting to cause a panic,” which might have ended in a politically popular but medically unfounded policy of exclusion.<sup>360</sup> Justice Hyman, on the other hand, criticized the city’s presumption of impending panic as “not [being] supported by any evidence.”<sup>361</sup> In fact, Justice Hyman suggested that precisely by *not* involving the public, city officials had themselves “let loose the forces of anxiety and fear.”<sup>362</sup>

For many parents of New York City public schoolchildren in 1985, the city’s decisions not to automatically exclude children diagnosed with AIDS from the classroom and to affirmatively admit one infected child abruptly removed the parents’ ability to protect their children from a potentially deadly disease. From a parent’s perspective, a disease that had seemed to only threaten others was suddenly a risk to them. Not just them—their children.<sup>363</sup> Parents’ fears were justifiable. After all, the virus that causes AIDS had recently been isolated in saliva and tears. News reports implied that isolating the virus in saliva and tears meant AIDS could be transmitted through those routes.<sup>364</sup> People tend to fit new information about potential hazards into what they already know, which meant parents reasoned their children would be at risk if they were to share a lollipop or console a friend, for example.<sup>365</sup>

Because New York City officials chose not to work with and educate the public on the

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<sup>355</sup> See generally Ropeik, *supra* note 210.

<sup>356</sup> KITTA, *supra* note 211, at 124. See also Ropeik, *supra* note 210, at 1033 (discussing the value of “two way risk communication”).

<sup>357</sup> See Opinion in Full at 82, Dist. 27 Cmty. Sch. Bd.

<sup>358</sup> Associated Press, *Poll Indicates Majority Favor Quarantine for AIDS Victims*, N.Y. TIMES, Dec. 20, 1985, at A24.

<sup>359</sup> KIRP, *supra* note 4, at 102.

<sup>360</sup> See Opinion in Full at 80, Dist. 27 Cmty. Sch. Bd.; KIRP, *supra* note 4, at 102-05.

<sup>361</sup> Opinion in Full at 80, Dist. 27 Cmty. Sch. Bd.

<sup>362</sup> *Id.* at 81.

<sup>363</sup> See Patricia Hurtado & Paul Moses, *Kids Swept Up in Parents’ Protest*, NEWSDAY, Sept. 10, 1985, at 21 (interviewing parents about fears of AIDS in school); *AIDS Boycott at 63 N.Y. Schools*, *supra* note 1 (describing parents’ fears and picketing of schools); Peters & Hanrahan, *supra* note 157; (discussing parents’ fears and government officials’ reactions) Page, *supra* note 216 (quoting parents who feared the good manners they taught their children would put the children at risk in school).

<sup>364</sup> See, e.g., *Scientists Find Aids Virus in the Teardrops of a Victim*, N.Y. TIMES, Dec. 20 1985; Lawrence K. Altman, *AIDS Studies Hint Saliva May Transmit Infection*, N.Y. TIMES, Oct. 9, 1984, at C1.

<sup>365</sup> See Ropeik, *supra* note 210, at 1030; Jeffrey Page, *Parents Voice Fear of AIDS in School*, THE RECORD (Hackensack, N.J.), Sept. 11, 1985, at A1.

risks a child diagnosed with AIDS might pose in the classroom, parents were left to make inferences based on their own understandings.<sup>366</sup> Take Maria Gallo as an example. It was a great irony to her that when a “kid vomits in school, they send him home. He gets a skin rash, they send him home . . . . And if the kid has AIDS, they say no problem, just send him in.”<sup>367</sup> Had city officials involved the public as partners and tried to “understand and respect the validity of the intuitive reasoning people use to gauge risk,” public education could have dissipated many parents’ similar concerns by filling in knowledge gaps with useful content and information targeted to public fears.<sup>368</sup> Instead, New York City officials took a mom-knows-best approach to developing the non-exclusion policy and thrust it upon the public without sweetening the pill through public input.

## V. EPILOGUE

The United States has lost more than 650 thousand women and men to HIV/AIDS since the disease was first documented.<sup>369</sup> More than 1.2 million Americans are living with HIV infection. Another 40 to 50 thousand people in the United States will seroconvert this year.<sup>370</sup>

But much has changed in the three decades since *District 27 Community School Board v. Board of Education*. In a 1987 opinion by Justice William Brennan, the Supreme Court ruled that people with infectious diseases are protected by Section 504 of the Rehabilitation Act from discrimination in housing, education, transportation, health care, jobs, or any other federally funded program.<sup>371</sup> In 1990, only months after Ryan White died, Congress passed the Ryan White CARE Act, which now provides \$2.3 billion a year to help more than half a million HIV-positive Americans cope with the disease.<sup>372</sup> In 1992, the Americans with Disabilities Act began to take effect, broadly prohibiting private discrimination against HIV-positive people and further protecting seropositive school children from discrimination in public and private schools. Then, during the mid-1990s, highly active antiretroviral therapy became available, effectively reducing AIDS death rates and more than doubling life expectancy from 10.5 to 22.5 years after HIV diagnosis.<sup>373</sup> Behavioral and educational programs developed in the aftermath of debates like those in *District 27* have helped the United States halve the rate of new HIV infections since the mid-1980s.<sup>374</sup> And over the past few years, pre-exposure prophylaxis has shown promising results

<sup>366</sup> See Ropeik, *supra* note 2109 (discussing heuristics).

<sup>367</sup> Page, *supra* note 359.

<sup>368</sup> Ropeik, *supra* note 2109.

<sup>369</sup> See *HIV/AIDS Basic Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://web.archive.org/web/20150702175836/http://www.cdc.gov/hiv/statistics/basics.html> (last visited May 12, 2016).

<sup>370</sup> See *HIV in the United States: At a Glance*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://web.archive.org/web/20150727194149/http://www.cdc.gov/hiv/statistics/basics/ata glance.html> (last visited May 12, 2016).

<sup>371</sup> Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

<sup>372</sup> *About the Ryan White HIV/AIDS Program*, U.S. DEP’T OF HEALTH & HUMAN SERVS. HEALTH RES. & SERVS. ADMIN., <https://web.archive.org/web/20150407223318/http://hab.hrsa.gov/about hab/about program.html> (last visited May 12, 2016).

<sup>373</sup> Ronald O. Valdisseri, *Thirty Years of AIDS in America: A Story of Infinite Hope*, 23 AIDS EDUC. & PREVENTION 479, 480 (2011).

<sup>374</sup> *Id.* at 481.

for decreasing HIV transmission among those substantially at risk of HIV infection.<sup>375</sup>

Unfortunately, many of the same fears and misconceptions that plagued Queens' parents in 1985 persist. In 2011 Abraham Smith sued Milton Hershey School in Pennsylvania for allegedly discriminating against the HIV-positive schoolchild. Milton Hershey School is a cost-free, private school founded by an American chocolatier to "provide a positive, structured home life year-round" for low-income students.<sup>376</sup> Milton and Catherine Hershey wanted to "help children gain the skills to be successful in all aspects of life."<sup>377</sup> Abraham Smith was the pseudonym for a thirteen-year-old honor roll athlete from Delaware County, Pennsylvania. Abraham is HIV-positive and in 2011 was taking five pills plus a vitamin each day to treat his illness but required no special accommodation at his public school. That year, he applied to transfer from his public school to the acclaimed Milton Hershey School. When Abraham's caseworker called to inquire about the school's policy regarding HIV-positive applicants, Milton Hershey School said it "did not take kids like that."<sup>378</sup>

School officials refuted the assertion. According to them, the woman who said Milton Hershey School did not accept HIV-positive children had no authority; and officials told Abraham they would consider his application. After Abraham sent the school his application and a copy of his medical records, Milton Hershey School officials said the boy would "not be considered for possible enrollment . . . [because his] needs [we]re beyond the scope of the Milton Hershey School programs."<sup>379</sup> With help from the AIDS Law Project of Pennsylvania, Abraham sued Milton Hershey School, and the U.S. Department of Justice launched an investigation. Despite the Americans with Disabilities Act and the fact that Abraham was already enrolled in public school without accommodation or incident, Milton Hershey School told reporters it could not "accommodate the needs of students with chronic communicable diseases that pose a direct threat to the health and safety of others."<sup>380</sup> The school's reference to unsubstantiated health and safety threats posed by Abraham was eerily reminiscent of the District 27 and 29 school boards' failed arguments in *District 27*. The difference, however, is that schools in New York in 1985 could rationally argue not enough was known about HIV to admit an infected child. Milton Hershey School in 2011 knew better. Under a settlement agreement with Abraham and the Department of Justice, Milton Hershey School had to pay the child \$700,000, adopt and enforce an anti-discrimination policy for students with disabilities, provide better training to faculty and staff on anti-discrimination laws, and pay an additional \$15,000 fine to the United States.<sup>381</sup>

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<sup>375</sup> HIV/AIDS: Pre-Exposure Prophylaxis (PrEP), CTRS. FOR DISEASE CONTROL & PREVENTION (June 25, 2015), <http://www.cdc.gov/hiv/prevention/research/prep/>.

<sup>376</sup> About, MILTON HERSHEY SCHOOL, <http://www.mhskids.org/about> (last visited May 12, 2016).

<sup>377</sup> *Id.*

<sup>378</sup> Complaint at 4, *Smith v. Milton Hershey School*, 11-cv-7391 (E.D. Pa., Nov. 30, 2011).

<sup>379</sup> Settlement at ¶ 15, *Smith v. Milton Hershey School*, 11-cv-7391 (E.D. Pa., Sept. 12, 2012), available at [https://web.archive.org/save/http://www.ada.gov/milton-hershey\\_sa.htm](https://web.archive.org/save/http://www.ada.gov/milton-hershey_sa.htm).

<sup>380</sup> Associated Press, *Hershey Settles HIV Suit with 14-Year-Old Student Denied School Admission*, CBS NEWS (Sept. 13, 2012, 10:46 a.m.), <https://web.archive.org/save/http://www.cbsnews.com/news/hershey-settles-hiv-suit-with-14-year-old-student-denied-school-admission/>.

<sup>381</sup> "Justice Department Settles with Pennsylvania School for \$715,000 Over Exclusion of Child with HIV," Press Release, Sept. 12, 2012, available at <https://web.archive.org/web/20150413100516/http://www.justice.gov/opa/pr/justice-department-settles-pennsylvania-school-715000-over-exclusion-child-hiv>.

Arkansas' Pea Ridge School District went even further than Milton Hershey School. In 2013, Pea Ridge Superintendent Rick Neal shut the public schoolhouse gates to three disabled Arkansas schoolchildren on the mere suspicion they may be HIV-positive.<sup>382</sup> When they showed up for school, the children were "set aside" until their foster parents could pick them up.<sup>383</sup> Despite nearly three decades of precedent and federal laws indisputably prohibiting serostatus discrimination, the Pea Ridge School District demanded the students' foster parents provide documentation the children were HIV-negative before they could begin school.<sup>384</sup> Again advancing the tired position debunked in Queens nearly three decades earlier, the school district asserted it was requiring the students provide HIV test results because of "certain actions and behaviors that place students and staff at risk."<sup>385</sup> When confronted by the Arkansas Disability Rights Center, Neal reversed course and allowed the children to return to school.<sup>386</sup> Whether the parents succumbed to the school's demand of HIV testing is unclear, and the Disability Rights Center expressed concern that the state Department of Human Services may have improperly released the students' testing records to the local school district.<sup>387</sup>

Officials at Milton Hershey School and in Pea Ridge are not misinformed outliers. An alarming number of people in the United States—including educators and healthcare workers—remain ignorant about HIV basics. Around 1 in 3 people in the United States does not know HIV cannot be transmitted by sharing a drinking glass, touching a toilet seat, or swimming in a pool with an HIV-positive person.<sup>388</sup> When asked whether there is a cure for AIDS, 1 in 4 wrongly responds in the affirmative. And almost 1 in 3 Americans believes there is a vaccine to prevent HIV infection.<sup>389</sup>

Along with misconceptions about HIV transmissibility, many people in the United States stigmatize HIV-positive men and women. A 2012 *Washington Post* and Kaiser Family Foundation poll shows nearly half of Americans would be uncomfortable having their food prepared by an HIV-positive person. A third would rather not have a roommate who is HIV-

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<sup>382</sup> Shain Bergan, *Kids Kicked Out of School Because of HIV Concerns, Disability Group Says*, 5 NEWS ONLINE (Sept. 13, 2013, 2:54 p.m.), <https://web.archive.org/web/20150425162520/http://5newsonline.com/2013/09/13/hiv-concerns-keep-kids-out-of-pea-ridge-schools-disability-group-says/>.

<sup>383</sup> *Id.*

<sup>384</sup> Rebecca Klein, *Arkansas School Tells 3 Students Not to Return After Finding They Could Be HIV-Positive*, HUFFINGTON POST (Sept. 16, 2013, 6:07 p.m.), [https://web.archive.org/web/20141114072459/http://www.huffingtonpost.com/2013/09/16/arkansas-students-hiv\\_n\\_3935952.html](https://web.archive.org/web/20141114072459/http://www.huffingtonpost.com/2013/09/16/arkansas-students-hiv_n_3935952.html).

<sup>385</sup> *Update: District Addresses Suspended Siblings*, NWA HOMEPAGE (Sept. 13, 2013, 2:59 p.m.), [https://web.archive.org/web/20140805174021/http://www.nwahompage.com/fulltext-news/disability-rights-group-students-kept-from-school-for-fear-of-hiv/d/fulltext-news/y1X-1EvV\\_kWeNiUfZdN1eQ](https://web.archive.org/web/20140805174021/http://www.nwahompage.com/fulltext-news/disability-rights-group-students-kept-from-school-for-fear-of-hiv/d/fulltext-news/y1X-1EvV_kWeNiUfZdN1eQ).

<sup>386</sup> Max Brantley, Blog, *Pea Ridge's HIV Issue Resolved, Superintendent Says. But Disability Rights Group Still Wants Answers*, ARK. TIMES (Sept. 17, 2013, 2:19 p.m.), <https://web.archive.org/web/20150801143512/http://www.arktimes.com/ArkansasBlog/archives/2013/09/17/pea-ridges-hiv-issue-resolved-superintendent-says>.

<sup>387</sup> See Max Brantley, Blog, *Disability Rights Center Protests Release of Student HIV Tests to Pea Ridge School District*, ARK. TIMES (Sept. 18, 2013, 9:53 a.m.), <http://www.arktimes.com/ArkansasBlog/archives/2013/09/18/disability-rights-center-protests-release-of-student-hiv-tests-to-pea-ridge-school-district>.

<sup>388</sup> WASH. POST & KAISER FAMILY FOUNDATION, SUMMARY AND CHARTPACK: 2102 SURVEY OF AMERICANS ON HIV/AIDS 14 (2012) [hereinafter 2012 SURVEY OF AMERICANS ON HIV/AIDS].

<sup>389</sup> *Id.* at 14.

positive, and more than a quarter of the country's parents would be uncomfortable if their child had an HIV-positive schoolteacher.<sup>390</sup> Perhaps expectedly, respondents who harbored misconceptions about HIV transmissibility were more likely to stigmatize HIV-positive women and men.<sup>391</sup> The poll results comport with other studies showing a correlation between lack of knowledge about HIV and increased prejudice against HIV-positive people.<sup>392</sup>

A national series of focus groups in 2009 provides context. Public Agenda, a non-profit civic research group, assembled people in cities across the United States to discuss their impressions of HIV/AIDS in America. Among the themes emerging from the focus groups was consistent "anxiety about the possibility of transmission through contact with HIV-positive individuals in certain occupations, such as medicine, dentistry, sports, food service, child care or teaching."<sup>393</sup> In virtually every focus group, participants "were clearly uncomfortable with the idea of having a teacher or doctor with HIV work with them or their children."<sup>394</sup> For the participants, "it was more about not taking any risks when it comes to the safety of their children."<sup>395</sup> One parent's thoughts were identical to parents' concerns in *District 27*: "[Y]our child is your number one priority. That should come first . . . If you know a person has AIDS, or you find out a person has AIDS . . . you might feel sorry for them, et cetera, but you wouldn't want them around your child."<sup>396</sup>

Just as parents are sometimes wary of HIV-positive teachers, so too are some teachers fearful of their students. A public school physical education teacher discussed his internal conflict about whether he could give CPR to an HIV-positive student. "What am I supposed to do?" the teacher wondered aloud. "This [schoolchild] has done nothing wrong . . . she got HIV from her parents."<sup>397</sup>

Lack of knowledge and information about HIV/AIDS and transmission was thematic across the focus groups. Many participants admitted they still relied on messages from early in the AIDS crisis, which made it difficult to distinguish between fact and rumor.<sup>398</sup> A Des Moines, Iowa, woman recalled, "[W]hen AIDS first hit in the '80s, people started hearing about it, and there was all these rumors how you can get it and how you can't . . . It kind of went away, and people started saying, 'No, you can't get it that way,' and then like I said, no one really knows."<sup>399</sup>

The early AIDS crisis instilled "so much fear in everybody's mind that it's hard to get

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<sup>390</sup> *Id.* at 16.

<sup>391</sup> *Id.* at 17.

<sup>392</sup> See, e.g., Don C. Des Jarlais et al., *Stigmatization of Newly Emerging Infectious Diseases: AIDS and SARS*, 96 AM. J. PUB. HEALTH 561 (2006); Arijit Nandi et al., *Social Support and Response to AIDS and Severe Acute Respiratory Syndrome*, 14 EMERGING INFECTIOUS DISEASES 825 (2008).

<sup>393</sup> JONATHAN ROCKIND, SAMANTHA DUPONT & AMBER OTT, IMPRESSIONS OF HIV/AIDS IN AMERICA: A REPORT ON CONVERSATIONS WITH PEOPLE THROUGHOUT THE COUNTRY 16 (2009).

<sup>394</sup> *Id.* at 30.

<sup>395</sup> *Id.* at 17.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 36-37.

<sup>398</sup> *Id.* at 17.

<sup>399</sup> *Id.*

that out,” a participant in Birmingham explained.<sup>400</sup> The same disjointed messages and politicized debates that confused and scared parents in New York City in 1985 continue as skepticism among many people today. One Los Angeles man expounded during a focus group session,

[F]irst, it was just everybody thought you couldn’t touch anybody that had it. Then they come to find out well, no, you have to have blood. Then it come [*sic*] to be intercourse, then they thought it was gays. Then they thought it was this and that. There’s a whole lot of rumors, and scientists are still studying and finding out every day.<sup>401</sup>

Nevertheless, participants nationwide acknowledged that misconceived fears about HIV communicability risked further stigmatizing HIV-positive women and men. Education about transmissibility would go a long way for eliminating fear and bias.<sup>402</sup> The *District 27* case was aimed at just that, and rescuing it from history’s dustbins will help shed light on how far Americans have come in combating HIV stigmatization over the past three decades—and how far we have to go.

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400 *Id.*

401 *Id.*

402 *Id.*